United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1140
76-1306

To be argued by:
PETER C. DORSEY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1140, 76-1306

UNITED STATES OF AMERICA,
Appellee,

—v.—

DAVID N. BUBAR, ET AL.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL TICHE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1140, 76-1306

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID N. BUBAR, et al.,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL TICHE,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On April 23, 1975, a Grand Jury, sitting in New Haven, Connecticut, returned an indictment against appellants and four others.[1] That indictment was assigned

[1] Named as defendants were appellants David N. Bubar, Peter Betres, Ronald Betres, Albert Coffey, Anthony Just and Dennis Tiche. John Shaw, also named as a defendant, pleaded guilty to charges of Conspiracy (18 U.S.C. 371) and Interstate Travel in Aid of Racketeering (18 U.S.C. 1952), and was sentenced to im-

[Footnote continued on following page]

Docket No. N-75-53. On May 8, 1975, the same Grand Jury returned a superseding indictment in twelve (12) counts against the same defendants, which indictment was assigned Docket No. N-75-59. Thereupon the original indictment was dismissed.

The counts in the superseding indictment were reduced by the Government in agreement with the Court. One count was dismissed by the Court. Trial commenced on October 6, 1975 with jury selection, and the indictment was then reduced to the following counts:

1. Conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1952 (Indictment Count 1).
2. Interstate Travel in Aid of Racketeering, i.e., commission of an arson, (18 U.S.C. 1952) (Indictment Count 2).
3. Interstate Transportation of Dynamite (18 U.S.C. 844(d)) (Indictment Count 3).
4. Possession of an Unregistered Firearm (26 U.S.C. 5861(d) and 28 U.S.C. 5871) (Indictment Count 12).
5. Possession of a Firearm in the Perpetration of a Felony, (18 U.S.C. 924(c)) (Indictment Count 7).

In all of the counts, an aiding and abetting charge was included under 18 U.S.C. 2. At the conclusion of

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prisonment for five (5) years on each count to run concurrently. Michael Tiche, also named a defendant, was tried with appellants on a superseding indictment and after a mistrial resulted from the failure of the jury to agree, Michael Tiche's case was reassigned to the Northern District of New York where, after a new trial, a guilty verdict has resulted in a sentence under the Youth Corrections Act. Michael Tiche's appeal from that verdict is a separate but consolidated appeal herewith (bearing Docket No. 76-1306). Donald Connors and Charles Moeller, also named as defendants, were tried with appellants on the superseding indictment and acquitted.

the Government's evidence, the fifth (5th) count (as numbered above) charging the violation of 18 U.S.C. 924(c) was dismissed.

Evidence was presented through January 6, 1976. After arguing of counsel, the jury was charged on January 14, 1976 and commenced its deliberations. The Court permitted the jury to deliberate on the cases of the defendants and return verdicts separately as they were decided.

The jury returned verdicts as follows:

1. January 14, 1976, not guilty on all counts as to Donald Connors.
2. January 19, 1976, guilty on all four (4) counts as to defendant, David Bubar.
3. January 19, 1976, guilty on all four (4) counts as against the defendant, Dennis Tiche.
4. January 22, 1976, not guilty on all counts as to defendant, Charles Moeller.
5. January 29, 1976, guilty on two (2) counts, the Conspiracy and Interstate Travel counts as against defendants Peter Betres, Ronald Betres, Anthony Just and Albert Coffey.
6. February 3, 1976, guilty on two (2) counts as to defendant Peter Betres, the charge of Interstate Transportation of Dynamite and the Receipt or Possession of a Firearm, and not guilty as to the one remaining count against the defendant Ronald Betres, the Receipt of an Unregistered Firearm.

On February 5, 1976, the jury reported themselves unable to reach verdicts on the remaining counts as to the

defendants-appellants Coffey and Just and the Court granted their motions for mistrials as to those counts.[2]

On February 11, 1976, the jury reported themselves unable to reach verdicts as to the defendant Michael Tiche and his Motion for Mistrial was granted. As noted above, a retrial as to the charges against him was conducted in New York, a verdict of guilty being returned on June 18, 1976, with an effective sentence to six years under the Youth Corrections Act.

The defendants were sentenced on March 22, 1976 as follows:

1. David Bubar—imprisonment for five (5) years on Count 1, and for five (5) years on Count 2 to run consecutively; ten (10) years on each of Counts 3 and 4 to run concurrently with each other and consecutive to the sentences on Counts 1 and 2, a total of twenty (20) years.

2. Peter Betres—imprisonment for five (5) years on Count 1, and five (5) years on Count 2 to run consecutively, and imprisonment for ten (10) years on each of Counts 3 and 4 to run concurrent with each other and consecutive to Count 1 for a total effective sentence of fifteen (15) years.

3. Dennis Tiche—imprisonment for five (5) years on Count 1, and for five (5) years on Count 2, to run consecutively, and imprisonment for ten (10) years on each of Counts 3 and 4 to run concurrent with each other, and consecutive to the sentence imposed on Count 1, a total effective sentence of fifteen (15) years.

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[2] The two remaining counts against defendants Coffey and Just were dismissed by the Government at the time of the sentencing.

4. Anthony Just—imprisonment for five (5) years on Count 1, and five (5) years on Count 2 to run consecutive with each other for a total effective sentence of ten (10) years.

5. Albert Coffey—imprisonment for five (5) years on Count 1, and for five (5) years on Count 2 to run consecutive with each other.

6. Ronald Betres—imprisonment for five (5) years on Count 1 and for five (5) years on Count 2 to run consecutive to each other.

Defendants-Appellants filed Notices of Appeal promptly thereafter.

Upon retrial in the Northern District of New York, Michael Tiche was found guilty on Counts One through Four (as numbered above) and was sentenced by Werker, J., sitting by designation, to six years under the Youth Corrections Act.

Motions

On September 5, 1975, a hearing was held before Judge Newman on all pre-trial motions. That hearing was resumed on September 8, at which time the Government advises that it would withdraw Counts 4, 5, 6, 9, 10 and 11 of the original indictment and deleted references to those counts in Count 1. On September 17, the court granted in part and denied in part defendants' motions for bills of particulars and ordered compliance by September 23, 1975. On that same date the Court issued its Memorandum of Decision on Defendants' Motions for Discovery and Inspection as well. Subsequently, on September 23, 1975 Judge Newman denied all motions to dismiss the remaining six counts of the indictment; ordered the Government to respond further to requests

for disclosure of mail cover or opening of first class mail; denied defendants' requests for disclosure of grand jury testimony (after having reviewed the transcripts *in camera*); granted the defendants' request for Brady materials; [illegible]d defendants' requests to dismiss the indictment [illegible]ilure of investigating agents to preserve their handwritten investigatory notes except to the extent that prejudice should be shown during cross-examination of any witness; denied motions of defendants Moeller and Bubar for a hearing *in limine* to require the Government to present its evidence of a conspiracy; denied defendants' Motions to conduct individual voir dire prospective jurors but granted leave for submission of questions to be directed to potential jurors by the court; granted motions for increase in a number of preemptory challenges; and denied the requests of several defendants to extend the time within which to file pretrial motions.

On September 29, 1975 a hearing was begun on Motions to Suppress eye-witness identification filed by defendants Bubar, Peter Betres, Ronald Betres, Coffey, Just, Dennis Tiche, Michael Tiche and Donald Connors. As of this date, the defendants were represented as follows:

Charles D. Moeller by Theodore I. Koskoff and Thomas Nadeau

David Bubar by Rudolph Zalowitz and Richard Meehan

Peter Betres by Leonard Martino and J. Daniel Sagarin

Ronald Betres by Alan Neigher

Albert Coffey by Andrew Bowman

Anthony Just by Gregory Craig

Dennis Tiche by Dennis Curtiss

Michael Tiche by Thomas Clifford

John Shaw by William Clendennon

Donald Connors by David Golub

The Court granted defendants' request to close this hearing to the public.

Statement of Facts

At 11:35 P.M. on Saturday, March 1, 1975, Plant 4, Sponge Rubber Products Company, Shelton, Connecticut, a four-story factory building measuring approximately 1200′ x 300′, erupted in an explosion and flames which destroyed it entirely except for a small portion of the North End in which a power plant was housed.[3] Investigation demonstrated that the destruction had been initiated by an explosive in combination with drums of gasoline.

As presented to the jury, the involvement of appellants was as follows:

A. David Bubar. As a confidante and advisor of Charles O. Moeller, (an acquitted defendant and the President and majority shareholder of the corporation which owned the plant) Bubar made contact so as to arrange the destruction through Peter Betres at Betres' Alhambra Hotel, in Butler, Pennsylvania. He met Betres in New York, brought him to the plant on two occasions, met him in New York on February 28, 1975 to bring him to Shelton, Connecticut, and paid over to him

[3] Plant 4 was one of six (6) individual plants which made up the industrial complex owned and occupied by Sponge Rubber Products Company.

at least Twenty-One Thousand ($21,000) Dollars out of Thirty-Five Thousand ($35,000) Dollars that he received from Moeller. The claimed purpose for the delivery of the money to Bubar related to a non-existent water-treatment project that was supposedly located at Plant 4. On March 1, 1975, Bubar provided a cover story for the three men, Appellants Dennis Tiche, and defendants Michael Tiche and John Shaw, whereby the three could get into the plant to set up the explosives and gasoline.[4] Bubar met with those three and the defendants Coffey, Just and Ronald Betres nearby the plant at about midday of March 1, 1975. He was in the plant on March 1, 1975 until approximately 8 to 9 P.M. while at least preliminary arrangements were made for the explosion. He also arranged to get the defendants Coffey, Just and Ronald Betres into the plant in the early evening of March 1, 1975.

B. Peter Betres. As the go-between, Peter Betres was shown to have met Bubar on at least three occasions, twice coming to Shelton including a visit on February 28, 1975. He brought defendant Connors to meet defendants Dennis Tiche and John Shaw after the latter two had purchased gasoline and explosives and loaded them in barrels on an Avis rented truck. Connors drove the truck to Connecticut.[5] Peter Betres received money from

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[4] Bubar described the three to Sponge Rubber Plant security personnel as telephone men doing a survey. After the fire he attempted to arrange corroboration of that story by Walter Wilhelm of Memphis, Tennessee. Wilhelm testified concerning Bubar's post-fire attempt and that neither he nor any of his men were involved in making any such survey.

[5] Connors defended on the argument that while he had admitted that he drove the truck to Connecticut, he did not know its contents nor their intended purpose nor use.

Bubar partly in the form of checks. He distributed Three Thousand ($3,000) Dollars to Dennis Tiche who in turn distributed shares of it to Shaw and Michael Tiche on the night of February 28, 1975-March 1, 1975. His delivery to Dennis Tiche took place at LaGuardia Airport while the three were on their way to Connecticut. He was the focus of numerous telephone calls among the participants of the conspiracy both at the Alhambra and at various locations at which he was placed while in Connecticut, including telephone conversations on February 28, 1975. The Avis rented truck was driven by C nors back to the Alhambra Hotel and after conversation between Connors and Peter Betres, Connors, as a result thereof, returned the truck to the rental agency. Peter Betres arranged transportation for Connors back from the rental agency after the truck had been returned, sending one of his, Betres', employees from the hotel whic ıe owned and operated to drive Connors back to the hotel from the rental agency.

C. Dennis Tiche. Dennis Tiche was a chemist. He was also a blaster, working in that capacity for a strip mine operated by his aunt and uncles. Dynamite had been purchased by the strip mine along with detonating cord on February 19, 1975. Inventories and other records failed to account for all of that explosive material except for a blasting log that Tiche claimed showed used of all that was not accounted for. That log showed blasting on February 14, 15 and 16 using the dynamite which was actually purchased and delivered on February 19, i.e., showing a use of the dynamite in advance of its actual purchase and delivery. If the log is disregarded, the amount of missing dynam..e as demonstrated by the inventories

closely corresponds with John Shaw's testimony as to the amount of the dynamite used. The gasoline and dynamite as well as other materials, were shown to have been assembled and loaded into barrels and then on the Avis rented truck at Tiche's place of business. Unused barrels, of the same type as those actually used, were burned at Tiche's place of business according to several witnesses, and the metal parts thereof were thrown into the strip mine.[6] Dennis Tiche and defendant Just were described as being in the plant on February 17, 1975 and two airplane tickets for a trip from Pittsburgh to New York and return on February 17, 1975, were recorded in the names of A. Just and D. Just. Those tickets were reserved with a return phone number given to the airline which was the telephone number for the home of Carl Just where Anthony Just was then residing. The venture was described as originally scheduled for February 21, but it was postponed from that date and defendant Just so advised Dennis Tiche by telephone. Telephone records showed three calls from defendant Just's brother's residence to Tiche's place of business on February 21 in the precise same number and times as described by Shaw. Tiche traveled to Connecticut

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[6] A search of the strip mine with a warrant disclosed the metal parts of 24 barrels. Shaw testified, and the invoice corroborated, that 50 barrels had been purchased and 26 barrels were used in the transportation. Comparison of the debris disclosed that the barrels originated as shipping barrels for materials of the Kodak Corporation and the same were traced through to the second-hand dealer who sold them in turn to Shaw. Photographic comparisons of the parts of the barrels removed from the debris in Shelton with the metal parts retrieved from the strip mine in Pennsylvania and parts of similar barrels used by Kodak proved the parts from all sources to be alike. Exhibits 29, 30 and 31.

with Michael Tiche and John Shaw on February 28, 1975, meeting Peter Betres in LaGuardia Airport where Three Thousand ($3,000) Dollars was paid over. Airline tickets and hotel reservations confirmed that trip.[7] The Three Thousand ($3,000) Dollars from Peter Betres was divided among the Tiches and Shaw.[8] Bubar obtained a Fifteen Thousand ($15,000) Dollar check from Moeller's company on February 28, and the records demonstrated the removal of a substantial amount of it in cash which was described by a bank official as likely to be in new One Hundred ($100) Dollar bills, at least in part. On March 1, 1975, after the three met with defendants Just, Coffey and Ronald Betres at a Howard Johnson's restaurant near the plant, Bubar vouched the Tiches and Shaw into the plant as telephone men. The three then prepared and ultimately placed the explosives and gasoline, setting them to be triggered in 25 minutes and leaving the plant, with defendant Ronald Betres, at 11:10 P.M.[9] Defendants Coffey, Just and Ronald Betres abducted the three plant personnel and ultimately Coffey and Just removed them from the plant and left them in a car on a road to the north of Shelton, Connecticut. Defendant Ronald Betres

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[7] The hotel registration was in the names of John Shaw and two pseudonyms, one of which was Jay Thomas, a code name used several times in the course of communications related to the conspiracy. The other two names other than that of John Shaw were demonstrated by a handwriting expert to be in the handwriting of Dennis Tiche and Michael Tiche, which testimony was ultimately stipulated to by said defendants.

[8] The payment was described by Shaw as being made in new One Hundred ($100) Dollar bills.

[9] A photograph in evidence of an electric clock in the plant shows it stopped at 11:35.

left the plant with defendants Shaw and the Tiches in Ronald Betres' car and met Coffey and Just at the point that the plant personnel were left. The six then checked the plant and found it burning and thereupon drove to New York in Ronald Betres' car. The Tiches and Shaw flew back to Pittsburgh on a flight that was corroborated by airline tickets as per Shaw's testimony.

D. Anthony Just was living with his brother, Carl, in 1975. From Carl Just's home phone calls were made to Tiche's plant, to the Alhambra Hotel, and to make airline reservations. Just talked to John Shaw and advised Dennis Tiche of the postponement of the venture from the original date of February 21. Just was identified as being with Bubar and Peter Betres in New York and thereafter having traveled to Shelton, and further was identified as having been in the plant with Dennis Tiche on February 17, 1975. He was identified as being at a motel in Danbury, Connecticut, in a room with Ronald Betres and Albert Coffey (fingerprints of Just and Ronald Betres were found) on February 28 and March 1, 1975 (the room was kept for the night of March 1, 1975, but the beds were not used).[10] Just came to a meeting of the six that eventually were in the plant plus Bubar at midday on March 1, 1975, and then entered the plant at night as arranged

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[10] Telephone records showed phone calls both on February 28, 1975 and March 1, 1975 back and forth between the motel pay phones and pay phones at a Howard Johnson's Restaurant and a discount store in the Shelton area where Peter Betres was observed making and receiving telephone calls and where he admitted being. Also phone calls were made from the same locations to various Pennsylvania locations including the Alhambra Hotel and Peter Betres' home. (See Exhibit 141)

by Bubar. He, with Coffey and Ronald Betres captured the three plant personnel and with Coffey removed them to an isolated location where they thereafter met the Tiches, Shaw and Ronald Betres, left the plant personnel and drove to New York. With Ronald Betres and Coffey he then drove to Pittsburgh.

E. Albert R. Coffey. In addition to the foregoing, defendant Coffey was identified, by handwriting, as having signed the rental contract for the Avis truck.[11] Coffey's handwriting was also found to be identical with the registration, in the name of Allan Baucan, for the Danbury motel room in which he was identified with Just and Ronald Betres.[12]

F. Ronald Betres, in addition to the foregoing, was placed with Coffey and Just at the Danbury motel. Betres was described as being bald at the time. He was also placed at the Howard Johnson meeting on March 1, 1975. It was his car in which the trip was made back to New York and along with Coffey and Just as passengers, was the car driven back to Pennsylvania. The registration of Ronald Betres' automobile corresponded in year, make, model and color to the vehicle described by

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[11] On its return, the truck was demonstrated to have accrued almost precisely the mileage, during its rental, as the mileage from Butler, Pennsylvania, where the trip originated, to Shelton, Connecticut, and return. The truck was rented in the name of Raymond Gray whose license had been used in the rental. Raymond Gray testified that he had not rented the truck, that he had given his address in applying for a renewal of that license as the Alhambra Hotel, where he lived, and that he had never actually received the license. Records demonstrated that he had been issued a duplicate license.

[12] It was stipulated that Allan Baucan was the husband of a woman with whom defendant Coffey had lived.

Shaw. A phone call record showed a collect call from a New Jersey pay phone, in the early morning hours of March 2, 1975, from Ronald Betres, to his home telephone in Butler, Pennsylvania. See Exhibit 75.

Overwhelming Evidence of Guilt

John Shaw, a defendant and co-conspirator, gave a complete statement of, and testimony at trial as to, the involvement of himself and all of the appellants in the perpetration of the destruction. He identified in the courtroom each of the appellants and described in detail their roles. He was corroborated in minute detail by other evidence, specifically to be noted in part, as follows:

A. With respect to defendant Bubar, he was identified by plant men as being present at the plant on March 1, going in and out on several occasions. He claimed that the truck carried lime. Phone records corroborated calls made as described by Shaw, from the plant, during the afternoon to the home office of the owning corporation. Phone records confirmed a telephone call by him from New York to an official of the corporation in which the fire was reported, which call was made shortly after midnight on March 2, 1975. Bubar could not then have known of the fire since he was at least 1½ hours away from Shelton and the fire had been triggered at 11:35 P.M., only ½ hour before the phone call. Thus Bubar could not possibly have known of the fire unless he was involved. He was quoted as having stated that he did not know of the fire when the F.B.I. interviewed him initially at approximately 3:30 A.M. on March 2, 1975 at his residence in New York. Bubar attempted to obtain a false alibi and his

cover story of a water treatment process was patently false, no such process being in existence at Plant 4. Phone records indicated his calls to various locations of other defendants. See Exhibit 141. He arranged the earlier trips of Peter Betres, Just and Dennis Tiche to the plant, including transportation and in several instances hotel accommodations using, for Peter Betres, the false name of Mike Jameson. Bubar's records and bank records confirmed his receipt and disbursements of the sums of money to Peter Betres.

B. *Peter Betres.* Defendant Connors, in a redacted statement, confirmed Shaw's description of the meeting at Boyers, Pennsylvania, at which the truck was turned over for Connors to drive it to Connecticut. Two witnesses, one an employee of Peter Betres, described their being requested by him to accompany defendant Connors on his return of the Avis truck from the Alhambra Hotel to the rental agency after Connors had returned it to the Alahambra from Connecticut. Airline tickets for Betres' trips were introduced as was evidence of his registration in a hotel in New York. The documentation of the rental of the truck in the name of Raymond Gray and the relationship of Gray to the Alhambra Hotel was demonstrated. The phone records verified various telephone calls which could have been found to have been made and/or received by Peter Betres. Peter Betres not only used a false name at a New York hotel, as verified by handwriting which was admittedly his, he also sought to cover up a Five Thousand ($5,000) Dollar check which he had received from defendant Bubar. Checks were introduced into evidence to confirm the payment by Bubar to Betres of at least Eleven Thousand ($11,000) Dollars.

C. *Dennis Tiche.* The seller of the dynamite corroborated the amount of dynamite sold in relation to the amount that Shaw described as having been transported to Connecticut and used.[13] The blasting log showed the use of the dynamite during the week prior to its actual purchase for which defendant, Dennis Tiche, offered, as an explanation, the contention that his calendar watch must have been off by as much as a week.[14] The barrels as described by Shaw were placed at Tiche's place of business by several witnesses including Marie Fobes, Tiche's girl friend, who also testified to the burning of the remaining ones. Tiche's absence on trips on February 17 and the weekend of February 28 to March 2, 1975 was also described by her. Tiche himself testified to coming to New Haven on February 28 for the purposes of a buying trip at which he was to meet an unidentified person described as Jay Thomas (please note the name) whom he had never previously met and did not know. He did not meet him in the course of his actual trip to New Haven.

D. *Anthony Just.* Just's involvement was corroborated by airline tickets recording a return flight by A. Just from New York to Pittsburgh (when Just was placed in New York with Peter Betres), on the same plane as Mr. and Mrs. Peter Betres,

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[13] Wampum Hardware personnel described the amount of dynamite sold and delivered on February 19, 1975 and the return of a portion thereof. The unreturned portion corresponded almost precisely to the amount which Shaw testified was used.

[14] This contention was refuted by evidence of the jeweler who testified that the watch worked fine when it was ultimately returned to him for allegedly necessary repairs.

and a round-trip on February 17, 1975, for A. Just and D. Just, reserved from Carl Just's phone. Fingerprints of Just were in the Danbury room rented to Coffey (Baucan).

E. *Albert R. Coffey.* The defendant Coffey was shown largely to be involved by his handwriting which was found on the truck rental documents and the motel registration at Danbury. Danbury motel personnel placed Coffey in the room with Just and Ronald Betres in which the fingerprints of Just and Ronald Betres were found.

F. *Ronald Betres* showed up to have his photograph taken, in the course of the investigation, wearing a wig when he had previously been described and identified as bald. At a subsequent occasion, within a few days thereafter, he returned for the taking of his photograph, this time with the wig removed at which time a very small amount of hair had grown in. At trial his hair had been allowed to grow out considerably. Numerous descriptions at the Danbury motel demonstrated the presence of one very akin in appearance to Ronald Betres, i.e., with a bald head. The collect telephone call made from New Jersey, in the name of Ronald Betres, to his own home phone, which call was accepted and therefore connected, would clearly corroborate Shaw's version that Ronald Betres was on his way home at that particular time since the route was down the New Jersey Turnpike to the Pennsylvania Turnpike and on to Pittsburgh.

In addition to the foregoing specific itemization, there is further the description by Shaw of the layout of the detonating cord and the explosives which coinncided minutely with the findings of the F.B.I. explosives expert

of craters, debris, and detonating cord explosion tracks on the floor of the building of which there were numerous photographs. Also, Shaw described the material purchases which were confirmed by receipts for the barrels, electrical items, a U-Haul truck used to obtain the barrels, the sellers of the gasoline. Further, Shaw described his placing his and Michael Tiche's luggage in the rear of the vehicle being used by Mr. Bubar at the time of the March 1 meeting at Howard Johnson's. Fingerprints of Michael Tiche and John Shaw were identified as having been found on a cardboard carton which was in the trunk of that car.

There were identifications made:

A. Bubar was identified as being with Peter Betres in New York on January 7, 1975 and with Betres and Anthony Just in New York on February 11, 1975. Bubar was identified as being in the plant with the three telephone personnel on March 1, 1975.

B. Peter Betres was identified with Bubar at which time he was using a false name.

C. Dennis Tiche was identified by a plant employee as being in the plant on March 1, 1975.

D. Anthony Just was identified in relation to the plant visits by several plant personnel and at Danbury on at least a similar appearance basis by three of the motel employees.

E. Defendant Coffey was identified at least as similar to the individual known as Baucan and in the hotel room at Danbury by several of the hotel employees.

F. Ronald Betres was identified as being at the hotel by several of the employees at least as being similar in appearance.

With respect to the defendant Shaw, he identified each of the defendant-appellants in court as well as Michael Tiche. He knew Dennis and Michael Tiche from prior to this venture. He identified defendant Connors who admitted being the one who drove the truck as Shaw has testified. He met Connors and Peter Betres in Boyers, Pennsylvania the night of February 27, 1975 when the truck was turned over to Connors. He also met Peter Betres in the terminal at LaGuardia Airport on February 28, 1975 when he with the Tiches were on their way to Connecticut and where there was a particular significance to Peter Betres as part of the venture. Shaw noted the man that he met at the LaGuardia air terminal as the same man who had driven up in the Cadillac with "Blackie" Connors when the truck was turned over to Connors. The vehicle registration demonstrated the ownership of a Cadillac of the same appearance as described by Shaw as being registered by the Commonwealth of Pennsylvania to Peter Betres. Shaw met Just, Coffey and Ronald Betres at Howard Johnson's in clear daylight on March 1, 1975. They met as the group that was going to undertake and complete the venture. He later was with these three in the plant and in Ronald Betres' car for the trip to New York from Shelton.

Statutes Involved

18 U.S.C. §2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §844(d)

Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

18 U.S.C. §1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102 (6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

26 U.S.C. §5861(d)

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

26 U.S.C. §5871

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

26 U.S.C. §5845(a)(8)

(a) Firearm.—The term "firearm" means (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

26 U.S.C. §5845(5)

(f) Destructive device.—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

28 U.S.C. §5841

(a) Central registry.—The Secretary or his delegate shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be

known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.—Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.—Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this act. —A person shown as possessing a firearm by the records maintained by the Secretary or his delegate pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.—A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary or his delegate upon request.

53a Connecticut General Statutes

(a) A person is guilty of arson in the third degree if he recklessly causes destruction or damage to a building of another by intentionally starting a fire or causing an explosion.

(b) Arson in the third degree is a class D felony.

18 U.S.C. §3161(h)

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any

proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which presentation is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period

of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A)Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of

defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

FEDERAL RULES OF EVIDENCE

Rule 801(d)

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representa-

tive capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 405

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 609

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but

only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence

of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 803(10)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

Questions Presented

I. Were the identifications of Peter Betres, Albert Coffey and Anthony Just properly admitted?

II. May Bubar, who was represented by counsel of his choice, obtain a reversal of his conviction by charging his counsel with incompetence?

III. May co-defendants claim prejudicial error in a joint trial with Bubar basing their claim on the representation of Bubar?

IV. Was the evidence sufficient to prove Peter Betres guilty as an aider and abettor?

V. Is a combination of dynamite, detonating cord and caps, and gasoline a destructive device as defined in Chapter 53 of Title 26?

VI. Was a certificate by the National Firearms Registry custodian proper proof of non-registration of a firearm?

VII. Did the court properly charge on the interstate travel violation in relation to Connecticut's arson statute?

VIII. Was the trial court obliged to terminate the jury's deliberations and order a mistrial?

IX. Did the rebuttal summation contain prejudiciously improper references to any defendant's failure to testify?

X. Was Peter Betres' sentence authorized by law?

XI. Was Bubar's sentence authorized by law?

XII. Did the court properly limit examination of witness Marley on the basis of Rule 608 (b) (2)?

XIII. Did the court properly admit—

A. The Southern Supply checkbook?

B. The records of numerous telephone calls?

C. The impeachment of defendant's witness Lantz?

XIV. On the retrial of Michael Tiche—

A. Did the date of his retrial violate any speedy trial right?

B. Was the trial court required to inquire of the jury as to the extent of their deadlock?

ARGUMENT

POINT I

The Court properly admitted all identifications.

A. Considering "the totality of the circumstances" Shaw's in-court identifications were founded on untainted bases.

Each of the four appellants raising the identification issue fundamentally misperceives the thesis at the core of the Second Circuit's recent opinions on the question of admission of in-court and pre-trial identifications. The Government takes as its point of departure the decision handed down in *Brathwaite* v. *Manson*, 527 F. 2d 363 (CA 2, 1975), *cert. granted* 96 S.C. 1737 (1976).

The *Brathwaite* opinion enunciates a dualistic approach to the identification problem, wherein the standard to apply to identification evidence proffered by the Government varies, depending upon whether the Government seeks admission into evidence of a pri[illegible], out-of-court identification, or an in-court identification. Where the identification evidence offered consists solely of an in-court identification, *Brathwaite* holds that the appropriate test of its admissibility is that espoused by the Supreme Court in *Simmons* v. *U.S.*, 390 U.S. 377, 384 (1968):

> ". . . We hold that each case must be considered on its own facts, and that convictions based on eyewitness identifications at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

To make this determination, the trial court is instructed by *Simmons* to consider the "totality of circumstances". *Id.*, at 383.

Brathwaite did *not* render the "totality of circumstances" test inappropriate to all identifications offered into evidence, or, what amounts to the same thing, apply the exclusionary rule of *Stovall* v. *Denno*, 388 U.S. 293 (1967) to every identification offered into evidence. The Second Circuit very recently affirmed the continued vitality of the "totality of circumstances"/"independent basis" test where the issue raised was the admissibility of an *in-court* identification. *U.S.* v. *Magnano*, Slip Op., 5471, at 5481 (2d Cir. Dkt. No. 75-426, Sept. 7, 1976). Judge Newman's sensitivity to this distinction between proffered testimony of in-court identification and proffered evidence of pre-trial identification of photographs is manifest from the trial transcript. [Tr. 2409].

The "totality of circumstances" test announced in *Simmons* amounts to an effort to determine whether there was, before the imprint arising from the pre-trial identification:

> ". . . such a definite image in the witness's mind that he is able to rely on it at trial without much, if any, assistance from its successor."

U.S. ex rel Phipps v. *Follett*, 428 F. 2d 912, 915 (2d Cir. 1970).

The trial court's determination that such an independent basis existed for the witness's in-court identification is not to be overturned in the absence of clear error. As the Second Circuit held in *U.S. ex rel. Miller* v. *LaVallee*, 436 F. 2d 875, 876 (2d Cir. 1970):

> "When the issue the trial judge must determine relates to the validity of a witness's identification

> of a defendant, we ought to accord great weight to the determination the judge makes, for he has seen and has heard that witness."

Because the trial judge occupies a uniquely favorable position from which to evaluate the "totality of circumstances" in determining whether an independent basis exists, it is undoubtedly true that in this Circuit, "appellate resolution [of this issue] marks the rare exception." *Clemons* v. *U.S.*, 408 F. 2d 1241, 1252 (2d Cir. 1968), *cert. den.* 394 U.S. 964 (1969), J. Leventhal concurring. See also *U.S. ex rel. Pella* v. *Reid*, 527 F. 2d 380, 384 (2d Cir. 1975); *Phipps*, *supra*, at 915; and *U.S.* v. *Mims*, 481 F. 2d 636, 637 (2d Cir. 1973).

The critical question to be decided here with regard to appellants Coffey, R. Betres, and P. Betres is whether Judge Newman's decision to admit John Shaw's in-court identification of these men was clearly erroneous. Judge Newman determined that these appellants did not suffer, given the totality of the circumstances, a "very substantial likelihood of irreparable misidentification" (*Simmons*, *supra*, at 384) arising from Shaw's out-of-court photographic identification of the three on April 10, 1975. In light of the nature and degree of Shaw's exposure to each of these men, and taking into account the various factual situations which this, and other courts have held sufficient to establish an "independent basis", it is clear that there was more than ample support for Judge Newman's finding that Shaw's in-court identification rested upon a basis independent from the earlier photographic identification.

John Shaw was introduced to appellant Coffey in the parking lot outside Howard Johnson's restaurant in Derby, Connecticut on March 1, 1975, the day of the fire at the plant. [See Tr. 2212-2217]. March 1, 1975 was a clear day, and at 12:30 P.M., the approximate time of

their meeting, the lighting was most direct and the shadows cast were fewest. With nothing to obstruct his vision, Shaw had an unimpeded opportunity to observe appellant Coffey during the fifteen minutes Shaw conversed with him and several others.

Very early the next morning Shaw and Coffey spent one and one-half hours together in a car traveling from the plant to New York. The journey was interrupted for a short stop at a roadside rest area where Shaw and Coffey, among others, left the car to walk around the lighted parking lot.

Upon reaching New York Coffey accompanied Shaw, among others, to a tavern where once again Shaw was able to observe the appellant at some length and under lighted conditions.

Shaw had even greater exposure to R. Betres during the day and night of the fire. [See Tr. 2217-2220; 2298-2304; and 3024-3038]. Appellant R. Betres was also introduced to Shaw in the Howard Johnson's parking lot at mid-day of March 1, 1975, and the two directly conversed for at least part of the fifteen minutes that the several conspirators stood in the parking lot. Moreover, R. Betres was also in the car transporting Shaw and Coffey back to New York. During the short stop at the rest area, R. Betres and Shaw changed their clothes together in the rest room and walked about the lighted parking lot. As with Coffey, Shaw was able to further refine his observation of R. Betres in the New York tavern where the conspirators had gone to share a few parting drinks. In addition to all of these opportunities to become well acquainted with R. Betres' features, Shaw spent several minutes while in the third floor conference room at the plant communicating at close range with R. Betres about the gun the latter had in his possession.

Shaw's exposure to Peter Betres consisted of the two separate occasions on which Shaw observed P. Betres and noted his physical characteristics and appearance. These clearly support the trial judge's finding, however, that Shaw had formed the requisite "definite image" (*Phipps, supra,* at 915) of appellant P. Betres prior to identifying him from the photograph. Their first meeting took place in Boyers, Pennsylvania, late in the evening of February 27, 1975 and under limited lighting. [See Tr. 2223-2231]. See Exhibits 150-155. There, the two were introduced and conversed at close range for approximately one minute. For the next several minutes Shaw stood by, listening to a conversation between P. Betres and co-conspirator Dennis Tiche. Taking into account Shaw's detailed description of what P. Betres was wearing at the time, the image formed in Shaw's mind of P. Betres from this one meeting was striking for its clarity, and was alone sufficient support for Judge Newman's determination that Shaw could make an in-court identification of this appellant without relying upon the photograph shown to Shaw subsequent to this meeting.

On February 28, however, Shaw again met Peter Betres, this time in a well-lit lobby of LaGuardia Airport. It was Shaw who first picked out P. Betres from a distance of over twenty feet, recognizing him as the man who had been introduced to him as "Pete". Once again, Shaw's thorough description of P. Betres' clothing reinforces the trial judge's determination that these two meetings provided Shaw with an independent basis from which to make his in-court identification.

On April 10, 1975 F.B.I. agents showed Shaw a stack of between six and fifteen photos, displayed one at a time. [See Tr. 2310]. Shaw recognized some and not others; three of those he did identify were the three appellants, Coffey, R. Betres, and P. Betres. No leading questions

were asked of Shaw, nor were any of the photographs emphasized or highlighted in any way. The agents offered no confirmation of Shaw's identifications. What is more, even if this photographic identification procedure could be said to have fallen short of the ideal, a premise which is not conceded, it is essential to remember that as of April 10, 1975, none of the appellants had been apprehended. As said in *Simmons*, *supra*, at 384-5,

> "It is not suggested that it was unnecessary for the F.B.I. to resort to photographic identification in this instance. A serious felony has been committed. The perpetrators were still at large . . . It was essential for the F.B.I. agents swiftly to determine whether they were on the right track."

In seeking reversal of Judge Newman's finding of the requisite independent basis for Shaw's in-court identification of Coffey, R. Betres, and P. Betres, the appellants overlook and fail to distinguish the plethora of "independent basis" cases where courts in this and other jurisdictions have upheld the finding of an independent basis in factual settings that provided the witness substantially *less* of an opportunity to observe the defendant than was present in this case.

In *U.S.* v. *Yanishefsky*, 500 F. 2d 1327 (CA 2, 1974), a solitary, virtually fleeting glance at the profile of the defendant was found to be an adequate basis for the witness to formulate a clear visual and mental impression of the defendant, despite the fact that the witness was neither victimized nor endangered by the defendant. The Second Circuit has also held that where a bank manager was only able to observe a partially disguised bank robber's face for between ten and sixty seconds, an independent basis for the witness's subsequent in-court identification of the defendant had nonetheless been established.

U.S. v. *Mims*, *supra*, at 637. The witness in *Phipps*, *supra*, at 913, had only thirty seconds in which to observe the defendant, a period of time during which the witness was also occupied in fending off the assault of another assailant. The court concluded that this period of observation was sufficient for the defendant's image "to become idelibly seared in [the witness's] memory." See also *U.S. ex rel Anderson* v. *Mancusi*, 413 F. 2d 1012, 1013 (1960). In *Coleman* v. *Alabama*, 399 U.S. 1 (1969) the witness-victim's time to observe also had to be calculated in seconds, rather than minutes or hours as is here the case. The assault took place late at night on the side of a road where the witness was busily engaged in changing a tire; and because the witness was short before he turned to observe his assailants it is fair to assume that his powers of observation were, to say the least, somewhat impaired. Under the *Simmons* "totality of circumstances" test, however, the lower court's ruling that the witness's in-court identification stemmed from an independent basis received plurality approval. *Id.*, at 4, 5.

Finally, the Sixth Circuit very recently scrutinized an in-court identification that had been preceded by a highly suggestive show-up, and found the in-court identification admissible because the witness possessed the following independent basis for making his identification in court. The witness was an uninvolved, unseen bystander to an armed robbery and the getaway. The witness had approximately forty-five seconds in which to observe the defendant as the former drove his car in the same direction as the defendant was walking, maintaining a distance of about eight feet between the car and the defendant during that time.

Surely Judge Newman was entitled to accord weight to Shaw's observations of appellants Coffey, R. Betres, and P. Betres as was true in the cases cited above. Sig-

nificantly adding to the weight that was and should be accorded to Shaw's pre-identification contact with the appellants is the fact that Shaw's testimony concerning his opportunities to observe the appellants emerged unscathed from rigorous cross-examination. *Simmons, supra,* at 384; *U.S. ex rel. Bisordi* v. *LaVallee,* 461 F. 2d 1020, 1026 (CA 2, 1972); and *U.S. ex rel. Gonzalez* v. *Zelker,* 477 F. 2d 797 (CA 2, 1973), *cert. den.,* 414 U.S. 924 (1973).

The "colloquy" between the United States Attorney and Shaw, referred to in appellant Coffey's brief, page 10, could in no way diminish the weight and value Judge Newman assigned to Shaw's opportunities to observe the appellants before the photo spreads were presented to Shaw. The United States Attorney's simple comment to Shaw that the defendants would be in the courtroom hardly created or increased the risk of irreparable misidentification. Mr. Dorsey never mentioned the name of any particular defendant during the conversation at issue, gave Shaw no instructions about the appearance or placement within the courtroom of any of the defendants, and never queried Shaw about his ability to identify any particular defendant.

What should and undoubtedly did affect the trial judge's determination that Shaw possessed the requisite independent basis was the nature and extent of evidence corroborating the witness's observations. *U.S.* v. *Stassi,* Slip Op. 247 at 255 (Second Circuit, Dkt. No. 76-23, October 26, 1976); *U.S.* v. *Reid,* 517 F. 2d 953, 967 (CA 2, 1975); *Phipps, supra,* at 916; and *U.S.* v. *Mims, supra* at 637.

The fact that Peter Betres was indeed at Boyers, Pennsylvania, for the turnover of the truck and at LaGuardia Airport as Shaw testified was corroborated by

the revelation of the following facts: Connors resided at the Alhambra Hotel, Betres arranged for Connors to return the truck, Betres owned a Cadillac (identified by Shaw as the make of car in which Connors was driven by Betres to Boyers), and Dennis Tiche deposited $1,000 three days after the fire (representing his split of the $3,000 Betres gave to him).

Coffey's involvement is corroborated by his handwriting being identified on the truck rental contract and the Danbury Motel registration, his use of the name Baucan, his drinking creme de menth and milk, his identification at the Danbury Motel in the company of Just and Ronald Betres. Ronald Betres' involvement is corroborated by Shaw's description of a car comparable to the car registered to Betres, his fingerprints and association with Coffey and Just in the Danbury Motel, and the phone record of a call from New Jersey to his home after 2 A.M. on March 2, 1975.

B. The "spreads" from which a photograph of Defendant Just was selected by several witnesses was in no way shown to have been suggestive.

Appellant Just's claim is different, stemming from a wholly different photographic spread and relating primarily to the admission into evidence of several witnesses' photographic identifications of him. Appellant Just charges Judge Newman with committing reversible error in admitting this evidence, which Just claims was the product of an impermissibly suggestive photographic spread compiled and displayed by the F.B.I. to William Povilaitis, Walter Pinchuk, Robert Brown, Kristine Kesten, and Kelsey O'Connor. Just also asserts that subsequent in-court identifications of him by witnesses who had been shown the "Tony Just Spread" were subject to a "very substantial likelihood of irreparable misidentifi-

cation" because of the spread deficiencies. This claim is readily disposed of by examination of the photographic identification procedure used [Tr. 10-35], the spread itself [Hearing Exhibit 30], and its alleged deficiencies.

The spread contains six photographs, all of white males of very nearly the same age. There is nothing about any of the men photographed to make this group any more heterogeneous than any other group of similarly aged, white males. Only one of the six photographs is of Anthony Just, and his photograph was never placed on the very top or very bottom of the stack handed to the witnesses, a measure taken to avoid calling undue attention to the photograph of Just. Witnesses were not allowed to view the spread together, and the F.B.I. agents in no way suggested which photograph the witness should identify or whether the identifications made by the witnesses were correct. The questions asked by the F.B.I. agents of witnesses viewing the spread were in no way leading or suggestive, the phrasing of the questions generally being whether there was anyone in the spread identical to an individual that the witness had seen on a prior occasion. [See, for example, Tr. 10, 35]. Finally, all the photographs had been carefully stripped of any and all identification markings prior to their inclusion in the spread. In all respects, this photographic spread is either equally non-suggestive, or even superior to the spread evaluated and approved in *Simmons*, *supra*, at 384-6. It should be further noted that the ratio of photographs of the defendant in *Simmons* to the total number of photographs in that spread was twice as high as was the case here. Credulity is too severely strained by appellant Just's argument that this spread was impermissibly suggestive. The "deficiencies" he complains of are absurdly trivial in light of the overwhelming evidence of caution and concern in the F.B.I.'s presentation. Minute differences in contrast among the six prints, slight

variations of lighting among the photographs, and minor differences in the hair styles of the men whose photographs were displayed simply do not rise to the level of constitutional infirmities of identification procedure. These differences simply reflect that, short of assembling photographs of sextuplets taken at the same time and under identical photographic conditions, there is no conceivable means to present a photographic spread which does not contain some heterogeneity among the individuals photographed. Individual differences, after all, are the very basis of recognition, the primary constraint upon the law enforcement authorities simply being that the individual differences should not be unusually great, highlighted, exaggerated, or in any way emphasized by the composition of the spread itself. The trivial differences between the photographs comprising the "Tony Just Spread" clearly do not, as appellant Just asserts, "give rise to a very substantial likelihood of irreparable misidentification."

Again, evidence corroborative of the witness's identification of Just from the spread as the man they had seen on prior occasions is useful in demonstrating that the photographic identifications were not the product of a suggestive spread.

Anthony Just's involvement is corroborated by the three phone calls recorded from his residence to Gatti Chemical Company on February 21 (in accordance with Shaw's testimony); his identification in New York and Shelton, Connecticut on two occasions, February 11 (with Peter Betres and Bubar) and February 17 (with Dennis Tiche and Bubar); his identification at Danbury; the presence of his fingerprints in Room 118 of the Motel along with those of Coffey and Ronald Betres, and his identification, at the instance of his own counsel, by the witness Kordiak. [TP 4134-4135].

POINT II

Appellant Bubar's representation does not merit reversal.

A. This Court should not in this case abandon its long-established standards for determining ineffectiveness of counsel claims.

Since *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) to *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (1976), the Second Circuit has uniformly adhered to stringent requirements for establishing claims of ineffectiveness of counsel. The standard is whether the representation was "so woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969) (*quoting United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)). It is the character of the proceedings which must be examined, *United States* v. *Maxey*, 498 F.2d 474, 483 (2d Cir. 1974), and the results of the inept conduct of counsel must have been so prejudicial to the defendant as to have deprived him of substantial rights. *United States ex rel. Maselli* v. *Reincke*, 383 F.2d 129, 132 (2d Cir. 1971). "Errorless counsel is not required, and before we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'" *United States* v. *Gargulo*, 324 F.2d 795, 796 (2d Cir. 1963) (quoting *Brubaker* v. *Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963)). This court has repeatedy rejected invitations to adopt less stringent standards. *See, e.g.*, *United States* v. *Yanishefski*, 500 F.2d 1327, 1333 n.2 (2d Cir. 1974).

This Court should not abandon its long-established standards for constitutional ineffectiveness of counsel. As Judge Prettyman argued in *Mitchell* v. *United States*, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958), a less stringent standard encourages criminals to put their attorneys on trial simply to satisfy their vindictiveness, allows prisoners to delay until evidence is stale enough so that a collateral attack on conviction might be risked, forces the judge to become a partisan for the defense and invade the attorney-client relationship, permits appellate advocates to demand a retrial anytime they believe a tactical error has been made by trial counsel, discourages reputable members of the bar from accepting appointments, and promotes writ-writing as a sport among prisoners. As Judge Friendly has noted in *United States* v. *Horton*, 334 F.2d 153, 154 (2d Cir. 1964), attacking the performance of defense counsel is "an all too easy avenue for the invalidating of convictions on pleas of guilty"—or on convictions. The stringent standards of the Second Circuit have not prevented this Court from conducting, in the proper case, an exhaustive inquiry into the representation actually afforded by trial counsel. *See United States* v. *Yanishefsky*, 500 F.2d 1327, 1329-33 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312-15 (2d Cir. 1974), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052, 1057-58 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United Sates ex rel. Crispin* v. *Mancusi*, 448 F.2d 233, 237-38 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States* v. *Matalon*, 445 F.2d 1215, 1218-19 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971). Nor has there been any showing that the more stringent standards of the Second Circuit have resulted in a less able performance by the trial attorneys of this Circuit than by those of Circuits utilizing more liberal standards; indeed, a comparison of ineffectiveness of

counsel claims in the Second Circuit with those of other circuits tends to indicate that just the opposite is true. *See, e.g., United States* v. *Fisher*, 477 F.2d 300, 301-02 (4th Cir. 1973) (attorney's pretrial consultation with defendant lasted less than an hour); *United States ex rel. Washington* v. *Maroney*, 428 F.2d 10, 12-13 (3d Cir. 1970) (attorney conferred only briefly with defendant before trial). Even if this Court intended to desert its stringent standards for ineffectiveness of counsel claims, this case is an inappropriate occasion on which to revise its standards. Even under less stringent standards of ineffectiveness, the gross incompetence of counsel must blot out the essence of a substantial defense. *Bruce* v. *United States*, 379 F.2d 113, 116-17 (1967). Here there has been no blotting out of any substantial defense which the defendant was willing to raise. See discussion *infra* Section III. Courts applying less stringent standards generally refuse to second-guess strategic and tactical choices made by trial counsel. *United States* v. *DeCoster*, 487 F.2d 1197, 1201 (2d Cir. 1973). Here the defendant himself made a shrewd strategic choice in employing an attorney upon whom he could rely to present a unique but confusing defense. See Discussion *infra* Section II. Finally, "a trial of such length, with proof so strong, and jury deliberation so careful," Trial Court's Ruling or Defendant's Motion for New Trial at 3, is an inappropriate occasion on which to alter this Circuit's standards for ineffectiveness of counsel.

B. Considering the overwhelming indicia of defendant's guilt, counsel's defense strategy represented a shrewd tactical choice.

Zalowitz's defense of the Reverend David Bubar was, perhaps, unique. Employing rhetoric from a bygone era, Zalowitz launched "a defense of God," Def-App. Brief at p. 6, a defense which he pursued vigorously. With fre-

quent references to God, Satan, angels, the Bible, and comparisons of the defendant to Christ, Zalowitz played the part of a "disciple echoing some message from the prophet." Def. Bubar's Brief at p. 6. He attempted to confuse by introducing a mass of irrelevant evidence, to throw up a screen by offering immaterial witnesses, many of them notable public figures, to obscure the issues by endless cross-examinations full of argumentative questions. He repeatedly and reverently referred to his client as a psychic and a phophet; he alluded to CIA machinations and FBI involvement, to mysterious coverups and dark suppression of evidence by the Government, none of which was substantiated.

In his summation, Zalowitz wove the threads that he had placed before the jury throughout the trial. He vilified the Government's chief witness, John Shaw, a "rocking chair robot," Defendant-Appellant's Supplemental Exhibit [hereinafter cited as D.S.E..] at 12, a "pathological liar coached with beauty and absolute finesse." D.S.E. at 52. Shaw, Zalowitz implied, was ungodly: he had in Pittsburgh set a fire within fifty feet of a church and a minister's home, D.S.E. at 17; he was a man who "play(s) with the lives of others," D.S.E. at 19, "contaminated . . . by Lucifer . . ." *id.* Zalowitz did not stop with John Shaw, for Shaw had been wrapped in "the mantle of protection of the government." D.S.E. at 21. The government, too, had dark purposes. The United States Attorney, Zalowitz reminded the jurors, had refused to call Bubar "the Reverend." D.S.E. at 39. The Government, that "all-seeing, all-knowing investigative power in America," D.S.E. at 41, had placed witnesses in "fear of the awesome power of the investigative positions of the F.B.I." D.S.E. at 40. Tape recordings had been suppressed, seemingly for no good reason. D.S.E. at 48. The Government had struck a plea-bargain with

Shaw that was "a defilement of our process . . . . a defi[illegible] of our justice." D.S.E. at 17-18. In short, "(t)he government, in its desire to gain convictions, truly sold away—as Esau and Jacob—sold away the birthright of America . . ." D.S.E. at 16.

The evil Shaw, backed by an all-powerful Government, was engaged in conflict with the Reverend David Bubar. "[W]ho do you attack if you have evil motivations?" Zalowitz asked the jury. "You attack a person who is old, unprepared, a person who is not capable of defending himself." D.S.E. at 21. Bubar was a man sought out for his spiritual guidance, D.S.E. at 24-25, who had "gone forth all of his lifetime to do nothing but help others." D.S.E. at 23. Zalowitz made sure that the jury would have photographs and a certificate of Bubar's o[illegible]nation, D.S.E. at 30-31, in the jury room, that "hall[illegible]d inner sanctum that no one w[illegible]ade, except God . . ." D.S.E. at 49. Bubar could n[illegible]defend himself: he was penurious, D[illegible].E. 24-25, unable to take the stand because of relig[illegible]conviction, D.S.E. 10-11, and, worst of all, he was [illegible]r too naive. "[W]hat is Reverend Bubar," Zalowitz asked. "[W]hat does he personify, ex[illegible]ept Godliness and one other thing: naivete? And if naivete is a crime, then I wonder how many of use would not be guilty of that crime?" D.S.E. at 23.

In short, Zalowitz defended his client zealously, doggedly, and flamboyantly. His strategy did not succeed, it is true: It deliberated three days before convicting Bubar.

Was Zalowitz' flamboyant defense so totally ineffective? As this court has observed, the quality of legal representation cannot be abstractly measured without reference to the merits of a defendant's case. *United*

States ex rel. Testamark v. *Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). In this case, the Government presented overwhelming evidence of the defendant's guilt. John Shaw, the Government's chief witness, described in detail Bubar's involvement in the Sponge Rubber Arson. Shaw testified that Bubar had met him, Dennis and Michael Tiche in a Howard Johnson's, driven them to the Sponge Rubber Plant [Tr. 2525-26], helped them gain admission by telling the guard that they were telephone repairmen whom he was taking on a tour of the building. Tr. 2530. Shaw testified that Bubar had led them through the building, Tr. 2534, and instructed them on the extent to which the building should be destroyed. Tr. 2535. Bubar, testified Shaw, had taken part in conversations about the best time to unload the barrels of gasoline, Tr. 2546; had made highly suspicious telephone calls, Tr. 2551-52); had participated in the decision on the timing of the fire, Tr. 2553; had led Shaw, and Dennis and Michael Tiche to a secure room where they could wait, Tr. 2553-54; had provided food and gloves to them, *id.*; was present when the gasoline was unloaded, Tr. 2556; had attempted to determine when the guards would be making their rounds, Tr. 2559; and had smuggled three other defendants into the factory in the back seat of a car, Tr. 2559.

Shaw's testimony was corroborated in minute detail by other evidence. Bubar was identified by plant men as being present at the plant on March 1, going in and out on several occasions. [Tr. 3915, 3921, 3922]. He claimed that the truck carried lime. Phone records corroborated calls made as described by Shaw, from the plant, during the afternoon to the home office of the owning corporation. [Ex. 141]. Phone records confirmed a telephone call by him from New York to an official

of the corporation in which the fire was reported, which call was made shortly after midnight on March 2, 1975. [Ex. 141]. Bubar could not then have known of the fire since he was at least 1½ hours away from Shelton and the fire had been triggered at 11:35 P.M., only ½ hour before the phone call. Thus Bubar could not possibly have known of the fire unless he was involved. He was quoted as having stated that he did not know of the fire when the F.B.I. interviewed him initially at approximately 3:30 A.M. on March 2, 1975 at his residence in New York. Bubar attempted to obtain a false alibi [Tr. 5148-5160], and his cover story of a water treatment process was patently false, no such process being in existence at Plant 4. [TP 6364-6365]. Phone records indicated his calls to various locations of other defendants. See Exhibit 141. He arranged the earlier trips of Peter Betres, Just and Dennis Tiche to the plant, including transportation and in several instances hotel accommodations using, for Peter Betres, the false name of Mike Jameson. [Tr. 4410]. Bubar's records and bank records confirmed his receipt and disbursements of the sum of money to Peter Betres. [Ex. 90-99, TP 6202 et seq.].

In short, this was "a case where something had to be done, but in which there was little that could be done." *United States* v. *Matalon*, 445 F.2d 1215, 1219 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971). Appellate counsel suggests that there were two possible strategies: "to adhere to Moeller [the plant's owner] and to present Bubar as solid, peaceful and rational, even though endowed with some psychic abilities . . .—or the defense of insanity." (Def. Brief at 29-30). Had the Reverend David Bubar adhered to the plant's owner, he might have aided the Government in obtaining the conviction of the owner, but it is impossible to understand how such a

defense could ever have resulted in his acquittal.[15] The defense of insanity was rejected by the defendant himself. See Discussion *infra* Section III. The defense that was presented was, in effect a diversion, the portrayal of Bubar as a visionary, ethereal and mystical, a man of God far divorced from sordid concerns of the world such as a Sixty-two Million Dollar arson. The jury was to believe that a good man, somehow, inexplicably, had become involved with a band of arsonists. Bubar, of course, could not take the stand to present the image to the jury: he would have had to explain too much on cross-examination. But by portraying the faithful disciple with complete faith in his master's psychic prowess, Bubar could stand as a symbol of the master's unearthly concerns—while at the same time attempting through his counsel's rambling and pompous rhetoric to obscure the overwhelming indicia of his master's guilt.

The tactics decided upon by the defense in this case are much like those described by Judge Friendly in *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970):

> When . . . the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best attorney can do . . . If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past.

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[15] Adherence to Mueller was at odds with Mueller's defense which was total disavowal of Bubar's machinations. Thus fruit from such an effort would be totally speculative.

C. Defendant's representation deprived him of no substantial rights, did not fail to present his cause in any fundamental respect, and in no way transformed the trial proceedings into a farce and mockery of justice.

The measure of a counsel's ineffectiveness is not the degree to which he was criticized by counsel for co-defendants with divergent interests, nor even the number of times he has been admonished by the trial court. Rather this Court must consider whether the inept conduct of counsel had been so prejudicial to the defendant as to have deprived him of substantial rights, *United States ex rel. Maselli* v. *Reincke*, 383 F.2d 129, 132 (2d Cir. 1971), and whether there has been a " 'total failure to present the cause of the accused in any fundamental respect.' " *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963) (*quoting Brubaker* v. *Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963)).

Appellate counsel has not pointed to any deprivation of substantial rights that occurred because of counsel's ineffectiveness. Appellate counsel claims that Attorney Zalowitz' lack of experience resulted in defendant's damaging statements to the F.B.I., a "key factor" in defendant's failure to testify in his own defense. Def. Brief at 15. Considering the weight of evidence against the defendant and the many possible points of impeachment, any defense lawyer should have advised Bubar against taking the stand, even had there been no damaging statements. Appellate counsel suggests a lack of pre-trial investigation, but points to no pre-trial motion that was omitted from the "battery" filed by Mr. Zalowitz, supplemented by two from co-counsel Meehan. Def. Brief at 16. Appellate counsel suggests that Mr. Zalowitz' ignorance of law and the rules of procedure and evidence was more

than convenient temporary blindness to constraints on his presentation of the case. Def. Brief at 17. Appellate counsel fails, however, to enumerate witnesses who might have been called, lines of inquiry that might have been pursued, or evidence that should have been excluded or evidence that should have been presented. Appellate counsel criticizes Zalowitz' poor cross-examination of government witnesses, Def. Brief at 21, but does not suggest that a more effective cross-examination might have elicited testimony more favorable to the defense. Finally, appellate counsel attacks Zalowitz' "unethical" and "bizarre" actions, Def. Brief at 23, "incoherent" defense strategy, Def. Brief at 24, and "ridiculous" summation, Def. Brief at 30. Appellate counsel fails to recognize that Zalowitz diligently, determinedly, even abrasively pursued the only defense possible—unless an insanity defense was to be presented—obfuscation.

The failure to present an insanity defense is the only deprivation of a substantial right to which appellate counsel points. In an ordinary case, this Court would be forced to rely on conjecture and surmise in order to determine why the insanity defense was not presented. *See e.g., United States* v. *Currier*, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969). This, however, is no ordinary case, for Attorney Zalowitz's Connecticut co-counsel in withdrawing from the case submitted to the trial court a sealed affidavit explaining in detail how and why certain defense decisions were reached.

This affidavit makes clear that the insanity defense was thoroughly explored. Attorney Meehan requested that the defendant submit to psychiatric evaluation and the defendant consented. 2nd Supp. Rec. at 4. The defendant was examined by a psychologist and by a psychiatrist, each of whom served on the staff of a respected

institution. *Id.* at 4-5. The examinations lasted approximately six and one-half hours, and each of the doctors received a resumé of all the information which Attorney Meehan could provide to help them prepare their history and evaluation. *Id.* at 5. Attorney Meehan discussed with each doctor the results of these examinations, concluded that a valid psychiatric defense might be presented, and requested that the defendant allow him to present a defense of insanity. *Id.* at 5-6.

The defendant, however, refused: he was opposed to the assertion of an insanity defense. *Id.* at 6. It is easy to speculate upon the reasons for the defendant's decision: a prophet, martyred by a guilty verdict, may be hailed as a saint, while the same prophet, acquitted by reason of insanity, may be viewed as just another crackpot. But whatever the reasons for the choice, the decision not to present an insanity defense was the defendant's own.

It has not been argued that the defendant was incompetent to make this decision. Attorney Meehan, privy to the diagnoses of the psychologist and psychiatrist, did not file a motion, nor does appellate counsel suggest that he was negligent in failing to do so. Indeed, appellate counsel concedes that defendant was not incompetent to stand trial. Def. Brief at 32. This Court, then, faces a situation in which a defendant, fully informed of the possibility of presenting an insanity defense, refused to allow that defense to be presented.

When an accused refuses to accede to a certain defense, only a very foolhardy or overbearing defense counsel would attempt to flout his client's wishes. At best, a counsel attempting to force a decision upon a client may expect to encounter resistance similar to that reported in *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36

(2d Cir. 1972), *cert. denied*, 910 U.S. 912 (1973). There, a defendant, apparently losing confidence in his counsel because of counsel's persistent efforts to convince him to plead guilty, exhibited "exasperating intransigence in totally refusing to aid his defense," *id.* at 47 (Kaufman, J., dissenting), with the result that an insanity defense could not be presented. At worst, a defense attorney who attempts to force a defense upon an unwilling accused risks embarrassments fatal to the defense similar to that reported in *United States* v. *Edmonds*, 535 F.2d 714, 721 (2d Cir. 1976), in which a defendant "interrupted summation, stating that he would not allow this argument to be made and . . . refus(ing) to participate further in the proceedings." Overbearing counsel disregards the teaching of *Faretta* v. *California*, 422 U.S. 806 (1975), with its observation quite applicable to the present case that "where defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." *Id.* at 834. Finally, such counsel ignores "that respect for the individual which is the lifeblood of the law." *Illinois* v. *Allen*, 397 U.S. 337, 350-51 (Brennan, J., concurring).

In *United States* v. *Bridgeman*, 523 F.2d 1099, 1118-1119 (D.C. Cir. 1975), *cert. denied*, — U.S. — (1976), a defendant demanded that his attorney call nine witnesses to testify; the attorney, despite serious misgivings, called three; the testimony of these witnesses was prejudicial to defendant. On appeal, defendant claimed that counsel had been ineffective because he had called the very witnesses whom defendant had demanded be called. The court "reject(ed) appellant's attempt to reverse his position at trial and now to protest trial counsel's decision to accede to his insistent demands that all nine witnesses be called: he cannot play both sides of the street."

Id. at 1118. Playing both sides of the street is quite clearly the game plan of the defendant: having refused to allow Attorney Meehan to present an insanity defense, he now complains that the unwanted defense was not forced upon him. To rephrase the often-quoted purple passage of *United States ex rel. Maldonado* v. *Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966), defendant demanded of his attorneys "that he be allowed to go to jail under his own banner," but his perception of the parade is transformed now that the procession has reached the prison door. Any failure to present defendant's cause in respect to an insanity defense arises, not from the ineffectiveness of counsel, but because of the Reverend David Bubar's own deliberate choice.

D. Defendant's complete acquiescence in his retained lawyer's presentation of his defense bars the post-conviction claim that his defense was incompetent.

"The idea," said the court in *Plaskett* v. *Page*, 439 F.2d 770, 771 (10th Cir. 1971), "that a defendant can hire his own lawyer and then claim discrimination because of the non-action of that lawyer deserves no comment." A long line of cases has held that the lack of skill or the incompetence of an attorney is attributed to the defendant who employed him, and that a defendant cannot seemingly acquiesce in his attorney's defense of him and, after the trial has resulted adversely, obtain a new trial because of counsel's incompetency. *See Plaskett* v. *Page*, *supra*; *Davis* v. *Bomar*, 344 F.2d 84, 86-89 (6th Cir.), *cert. denied*, 382 U.S. 883 (1965); *United States ex rel. Darcy* v. *Handy*, 203 F.2d 407, 425-26 & n.10 (3rd Cir. 1953); *Tompsett* v. *Ohio*, 146 F.2d 95, 98 (6th Cir.

1944), *cert. denied*, 324 U.S. 869 (1945); *Hudspeth* v. *McDonald*, 120 F.2d 962, 968 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941); *Jones* v. *Balkcom*, 210 Ga. 262, 264-65, 79 SE.2d 1, 3-4 (1953), *cert. denied*, 347 U.S. 956 (1954). Although the Second Circuit has never explicitly accepted the distinction between retained and appointed counsel, the court in *United States* v. *Terranova*, 309 F.2d 365 (2d Cir. 1962) rejected an ineffectiveness of counsel claim by a defendant who had instructed his retained attorney to stand mute during trial. The Court, in rejecting this claim, stated that "the choice of counsel and the decision as to the extent of participation of counsel in trial proceedings is for the defendant to make. He cannot manipulate that right so as to interfere with the fair administration of justice." *Id.* at 366.

This distinction between retained and appointed counsel had been attacked, mainly because the layman has limited opportunity to evaluate his lawyer beforehand or to control his lawyer's handling of the defense. *See Garton* v. *Swenson*, 497 F.2d 1137, 1139-40 n.4 (8th Cir. 1974); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 *Va. L. Rev.* 927, 929 n. 10 (1973). The present case, however, is very different from one in which an inexperienced defendant of limited intelligence, selects incompetent counsel. Defendant's unceasing support of Attorney Zalowitz throughout trial and even during appeal reveals not only acquiescence in his counsel's presentation of the case, but full approval of his counsel's performance however ill-advised his present counsel may cast it.

Attorney Zalowitz was no stranger to the defendant: Bubar apparently had often consulted him on civil matters. Def. Supp. Ex. at 55. In late March, 1975, soon after the fire, the defendant paid him a $2,500.00 re-

tainer. Def. Brief at 4. Although an able Connecticut counsel was also retained to represent the defendant, defendant made no complaint when Mr. Zalowitz conducted most of the defense. On November 11, 1975, more than a month after the trial had started, Connecticut counsel moved to withdraw from the case. By this time, much of the conduct complained about by appellate counsel had long been apparent: Mr. Zalowitz had already attempted to cause confusion with vague references to the First Amendment, Transcript [hereinafter Tr.] 1614, 1716, with reminders of the defendant's psychic and prophetic power, Tr. 1725, 4205, and with characteristic cross-examination, Tr. 4433, 5017, 5035, 5049. He had been admonished by the court. Tr. 332, 417, 421, 431, 544, 3433, 4180, 4994, 5035. His cross-examination of the Government's chief witness, John Shaw, complete with punning on the words "glean" and "gleam," had occurred, and he had reduced the courtroom to laughter with his questioning of an F.B.I. agent on the meaning of the word "enchilada." Def. Supp. App. at 3A, Tr. 1352. In short, by November 11, it was perfectly clear exactly what type of defense Attorney Zalowitz intended to present: he would attempt, through flamboyant bluster and archaic panache, to obscure the evidence which, unobscured, could only lead to the conviction of his client.

At the time of Connecticut co-counsel's motion for withdrawal, then defendant had observed more than a month's proceedings in which the performance of his attorney was apparent. Yet, when the defendant was asked by the court, "Do you have any objection to your co-counsel, Mr. Meehan, withdrawing from the case?" the defendant responded, "No, sir." Tr. 5179. Mr. Meehan was permitted to withdraw on the condition that he might be asked to return if he were needed. Tr. 5189-90. Mr. Bubar made no such request.

Defendant wanted no counsel other than Attorney Zalowitz. By December 2, 1975, the defendant had heard attorneys for co-defendants complain about Mr. Zalowitz' conduct of the Bubar defense. Tr. 5392. On that morning, Mr. Zalowitz asked for a week's adjournment. Tr. 7528. The Court explained to the defendant that he had the option of requesting either that Mr. Zalowitz be present or that Mr. Meehan, withdrawn co-counsel, appear for the limited purpose of assisting the defendant during Zalowitz' absence and the presentation of a co-defendant's case. Tr. 7532-7535. Defendant and Zalowitz were to discuss this option during lunch recess and inform the court of their decision at the start of the afternoon session. When court convened, they provided their answer:

> Mr. Zalowitz: . . . On Thursday morning, by the grace of the Master on high, I shall be here as the chief and only counsel for Reverend David Bubar.
>
> The Court: All right.
>
> Mr. Zalowitz: And Reverend David Bubar has voluntarily assured me that's his expressed desire and wish.
>
> The Court: All right.
>
> Mr. Zalowitz: Would you kindly put it on the record?
>
> Defendant Bubar: That's true. I wish only Mr. Zalowitz, and I have no desire for any other attorney, your Honor.
>
> The Court: All right.
>
> Trans. 7601-0.

On two other occasions the Court reminded Attorney Zalowitz and the defendant of the option of co-counsel's

limited participation in the defense, and each time the option was emphatically rejected by Mr. Zalowitz, with no protest by the defendant. Tr. 7839-40, 7690-91. Even after his conviction, he requested this Court to allow Mr. Zalowitz to file a full brief on this appeal. Mr. Zalowitz apparently continues to represent him in state criminal proceedings arising out of the same incident.

In short, though the defendant has been given ample opportunity to utilize the services of a highly respected and seasoned criminal defense attorney, he has wanted Attorney Zalowitz, and only Attorney Zalowitz, to conduct his defense. When a defendant has so clearly and unequivocally approved of the defense his retained attorney has presented, the distinction between retained and appointed counsel should be observed. The defendant retained Mr. Zalowitz, insisted that Mr. Zalowitz represent him, and resisted the suggestion that other counsel be allowed to represent him even for limited purposes. The defense presented was thus, in a very real sense, the defendant's own defense, and Attorney Zalowitz was truly his agent. Defendant should not now be heard to complain that his chosen defense or his selected agent were ineffective.

POINT III

The District Court did not abuse its discretion in denying Appellant's motions for severance.

Fed. R. Crim. P. Rule 14, permits the trial court to grant a severance where it appears that a defendant is prejudiced by an otherwise proper joinder of defendants for trial.[16] Such motions are directed to the discretion

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[16] Appellants make no claim of misjoinder. See Appellant Peter Betres' Brief at p. 29.

of the trial court, *Opper* v. *United States*, 348 U.S. 84 (1954); *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), which has a continuing duty throughout the trial to grant a severance if prejudice appears. *Schaffer* v. *United States*, 362 U.S. 511 (1960). Because the trial court is in the best position to assess the potential for prejudice, its decision, reviewed for a clear abuse of discretion, *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974), is rarely disturbed. *United States* v. *Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975). Thus, even where a decision to sever would have been sustainable, the refusal to do so does not constitute an abuse of discretion. *United States* v. *Rivera*, 348 F.2d 148, 150 (2d Cir. 1965).

Given this strong federal policy favoring joinder, *United States* v. *Leonard*, 494 F.2d 955, 965 (D.C. Cir. 1974), in order to be entitled to a severance a defendant must show substantial prejudice amounting to the denial of a fair trial and not merely that he would have had a better chance for acquittal if he had been tried separately, *United States* v. *Corr*, slip op. 5891, 5911 (2d Cir. October 22, 1976); *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913, 928, 942 (1973); or if the efforts of counsel in a joint trial had been coordinated, *United States* v. *Calabro*, 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) and 406 U.S. 933 (1972).

Appellants Coffey, Just, Peter Betres, Ronald Betres and Dennis Tiche argue that the courtroom conduct of Rudolph Zalowitz, Bubar's attorney, so distracted and antagonized the jury that it was unable to focus properly

on the evidence, thus denying them a fair trial.[17] The District Court properly rejected this contention.[18]

This Circuit consistently has upheld the denial of a severance motion where one co-defendant has exhibited disruptive courtroom behavior, an occurrence far more likely to cause spill-over antagonism to associated defendants than the behavior complained of herein, the conduct of counsel. *See, e.g., United States* v. *Barrera,*

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[17] Peter Betres further supports his claim of prejudice by asserting a conflict between his defense (Bubar was insane, Bubar and Festa conspired to commit the arson) and that offered by Bubar (psychic prediction). This claim is without merit. Initially, although the two defenses are different, it is unclear just how they are inconsistent. More importantly, where there is independent evidence of each defendant's guilt, the existence of inconsistent defenses is not sufficiently prejudicial to require severance. *United States* v. *Jenkins,* 496 F.2d 57, 67 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). The substantial independent evidence against Peter Betres, see Statement of Facts, *supra,* clearly satisfies that standard.

Ronald Betres also alleges that he suffered prejudice from guilt by association with the defendants more seriously implicated in the crime. Since in any multi-defendant trial there will be differences in the degrees of guilt and notoriety, Betres' lesser involvement did not necessarily justify an individual trial. Given the evidence demonstrating Ronald Betres' participation in the conspiracy, the trial court's cautionary instructions, see discusson *infra,* adequately protected Betres from prejudice. *United States* v. *Corr, supra.* That Ronald Betres was acquitted of one count should not be deemed without significance.

[18] The motion for severance based upon Zalowitz's conduct initially was made by defendants Connors, Michael Tiche and Dennis Tiche (Tr. 5392). The District Court denied the motions because it was "entirely satisfied" that the behavior complained of in no way affected the jury's ability to compartmentalize the evidence presented. The same motion was made and rejected at least twice more during the trial (Tr. 7517, 7687). Thus there can be no doubt that the District Court fulfilled its obligation to assess the potential for prejudice throughout the trial.

486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974) (fit thrown by co-defendant); *United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972) (obstreperous courtroom conduct by co-defendant); *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963) (chair thrown at prosecutor by co-defendant); *United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1960) (tirade by defendant against co-defendants). In *United States* v. *Calabro*, *supra*, the Court of Appeals rejected an argument closely analogous to that raised in the case at bar—that inept questioning and incessant flamboyance and posturing by a *pro se* defendant had made it impossible for his co-defendants to obtain a fair trial. In holding that the denial of the severance motion was not an abuse of discretion, the Court noted that "the difficulties [complained of] are not essentially different from those which any defendant might suffer in a joint trial if the efforts of counsel are not coordinated." 467 F.2d at 988.

In the instant case, Judge Newman, carefully assessing the potential for prejudice, concluded that the conduct of Zalowitz in no way made it "in the least bit difficult for the jury . . . to understand and think about the evidence that affects particular defendants and decide issues of guilt or innocence of each defendant according to each defendant's case . . . ." The District Court also noted its intention to give cautionary instructions that "what lawyers do and what the court says to lawyers is certainly not to affect [the jury's] judgment of the guilt or innocence of any defendant." (Tr. 5396-5397). The Court did so instruct the jury (Tr. 10920, 10928, 11006). Such limiting instructions adequately protected appellants from prejudice. *United States* v. *Brown*, 335 F.2d 170 (2d Cir. 1964); *United States* v. *Aiken*, 373 F.2d 294, 300 (2d Cir. 1967); *United States* v. *James*,

494 F.2d 1007, 1012 n. 2 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974). Moreover, the Court permitted the jury to return verdicts separately as they were decided, a procedure which maximized individual consideration of the case against each defendant. The sequence and timing of the verdict rendered clearly demonstrates that the jury did just that.

The length of the deliberations and the nature of the verdicts returned furnish no support for appellants' allegations that the jury was too distracted and antagonized to fairly consider the case against each defendant. One month of deliberating was required before resolution was reached as to all the defendants. Two defendants, Connors and Moeller, were acquitted of all counts. Three defendants, Bubar, Dennis Tiche and Peter Betres, were convicted of all counts. Ronald Betres was found guilty of two counts and not guilty of one. Coffey and Just were found guilty of two counts. The jury was unable to agree on a verdict for two counts against Coffey and Just and for any of the counts against Michael Tiche. Verdicts such as these conclusively prove that the jury totally meticulously and scrupulously weighed the evidence in relation to the elements of each charge against each defendant. See *United States* v. *Carr*, *supra*; *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007, 1012, 1024 (1970); *Barnes* v. *United States*, 381 F.2d 263 (D.C. Cir. 1967); *United States* v. *Vida*, 370 F.2d 759 (6th Cir. 1966).

Since no substantial prejudice resulted from joint trial, the District Court did not abuse its discretion in denying appellants' motions to sever.

POINT IV

Peter Betres was properly tried and convicted as an aider and abettor.

Count 4 charged not only violation of the Title 26 substantive offense, receipt and possession of an unregistered firearm, but of 18 U.S.C. 2, aiding and abetting. The case against Peter Betres on this count was submitted to the jury solely on the aider and abettor theory. The Government never claimed that he actually or constructively received or possessed the materials constituting the destructive device. Defendant argues that if anything he was shown to have aided and abetted the delivery of the device and not its receipt and possession. This is a distinction, in the case at bar, without a significant difference.

Betres could have been found to have had a large, if limited in specifics, participation in this endeavor. He cased the plant in January and on February 11 with defendant Just who recased the plant with defendant Tiche on February 17. Betres received money from Bubar which could be inferred to have found its way to Dennis Tiche and Shaw who had received money for his purchases of electrical items, the drums and gasoline from Tiche, and to the rental of the Avis truck which he arranged to have returned.[19] He brought defendant Connors to Boyers, Pennsylvania, from which Connors drove the truck with the components of the destructive device in it to Connecticut. Betres received money from Bubar on

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[19] The rental of the truck by defendant Coffey may inferentially be related to Betres by Coffey's residence at the Alhambra Hotel, the use of the Ray license (mailed to the Alhambra Hotel but not received by Ray) in order to rent the truck, and the return of the truck to the rental agency at Betres' instance and as arranged by him.

February 28, 1975, and inferentially, gave part of it at the LaGuardia Airport to Dennis Tiche and in turn to Michael Tiche and John Shaw. He could be found to have been in phone communication with Just, Bubar, and the three defendants who were at the Danbury Motel at crucial times. See Exhibit 141.

The actual receipt and possession of the materials constituting the destructive device commenced when they were assembled on the truck at Dennis Tiche's place of business on February 27, 1975. The receipt and possession continued through the delivery of the materials, in the truck, to Connors, also on February 27. It continued on February 28 and March 1 while the materials were on the truck en route to Connecticut and then when they came into the possession of the Tiches, Bubar and Shaw in the plant.

Betres' role and actions facilitated the availability of the truck, the acquisition and assembly of the materials and their transportation to and use in Connecticut, including the presence and effort of Coffey, Connors, the Tiches and Shaw, the latter four having actually received and possessed the device and its components at the various stages noted above. It was Betres' promotion, facilitation, cooperation, aid, procurement, participation as to contribute to the actual success of the venture which included the receipt and possession of the destructive device either at or before the commission of the crime, his assistance all considered that require his conviction on Count 4 to be found valid and proper. See *Richardson* v. *U.S.* 181 Fed. 1 (CA 3, 1910); *United States* v. *Manna*, 353 F.2d 191 (CA 2, 1965), *cert. denied*, 384 U.S. 975, *reh. denied*, 385 U.S. 893; *United States* v. *Dickerson*, 508 F.2d 1216 (CA 2, 1975); *United States* v. *Wiebold*, 507 F.2d 932 (CA 8, 1974); *Kaminski* v. *United States*, 460 F.2d 960 (CA 5, 1972); *United States* v. *Tauro*, 362 F. Supp. 688, *aff'd* 493 F.2d 1402 (CA 3, 1973).

POINT V

The combination of dynamite detonating cord, caps and gasoline constituted a destructive device requiring registration under Chapter 53, Title 26 U.S. Code.

Defendants argue that the materials in this case, dynamite, detonating cord, detonating caps and gasoline, did not constitute a destructive device for which registration was required. It is unlawful to receive or possess a firearm which is not registered in the National Firearms Registry and Transfer Record. 26 U.S.C. 5861(d). The penalty for violation thereof is found in 26 U.S.C. 5871, both sections being contained in Chapter 53. A firearm is defined to include a destructive device [20] which in turn is defined, *inter alia*, as any explosive, incendiary, or poison gas bomb . . . or similar device [21] and includes "any combination of parts either designed or intended for use in converting any device into a destructive device." [22]

The evidence demonstrated the possession, and use to initiate the fire, of a timing device, which energized and triggered detonating caps, which in turn exploded detonating cord, which in turn exploded sticks of dynamite placed under barrels filled with gasoline which was thereby ignited and spread to create an instantaneous holocaust throughout the building. It is the Government's claim that these materials, as assembled and interconnected, constituted a device which was objectively destructive, i.e., a giant incendiary bomb or Molotov cocktail as analyzed in *United States* v. *Cruz*, 492 F.2d 217 (C/A 2, 1974),

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[20] 26 U.S.C. 5845(a)(8).

[21] 26 U.S.C. 5845(f)(1)(A) & (F).

[22] 26 U.S.C. 5845(f)(3)—See United States v. Davis, 313 F. Supp. 710, 711 (D.C., Conn. 1970).

cert. denied, 417 U.S. 935. Defendants rely on *United States* v. *Posnjak*, 457 F.2d 1110 (C/A 2, 1972), decided before *Cruz*. There the defendant was charged in relation to a supply of dynamite with fuses and caps and the court there held, as the legislative history demonstrated that dynamite, available from commercial sources and usable for legitimate purposes, was not considered to be within the statute.[23] Cf. *United States* v. *Oba*, 448 F.2d 892, C/A 9 (1971), *cert. denied*, 405 U.S. 935; *Lengel* v. *United States*, 451 F.2d 957 (C/A 10, 1971).

In *United States* v. *Cruz*, a Molotov cocktail, or firebomb, was held to be within the definition. 492 F.2d at 219, citing *United States* v. *Ross*, 458 F.2d 1144 (C/A 5, 1972), *cert. denied*, 409 U.S. 868, and *United States* v. *Davis*, *supra*, and reciting a compatibility of its holding with *United States* v. *Posnjak*, *supra*, ". . . Molotov cocktails are objectively destructive," referring back to *United States* v. *Posnjak*, *supra*, "and for which there are no legitimate industrial uses. The Act thus clearly encompasses Molotov cocktails, since they have no use besides destruction." *United States* v. *Cruz*, *supra*, at 219. So as a Molotov cocktail was "a crude but well-known variety of incendiary bomb", id. at 219, *United States* v. *Posnjak*, *supra*, at 1119, the materials here, whether taken as 24 separate gas-filled drums in conjunction with an amount of igniting and dispersing dynamite and with a common source of triggering, or as a single interconnected complex of incendiary devices, constituted an objectively destructive device, "prone to abuse and for which there [is] no legiti-

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[23] "Mr. Metcalf: Does [explosive device] mean dynamite for mines or construction companies, etc. is included?

Mr. Dodd: No, it does not, Senator. What I had in mind was things like hand grenades and other types of mines or bombs." *United States* v. *Posnjak*, *supra*, at 1116; 114 Cong. Record 12448 (1968).

mate industrial use." id., 219. "The devices that are enumerated have in common usage limited to anti-social purposes". *United States* v. *Ross, supra*, at 1145. *United States* v. *Tankersly*, 492 F.2d 962 (C/A 7, 1974); *United States* v. *Peterson*, 475 F.2d 806 (C/A 5, 1973), *cert. denied*, 414 U.S. 846. No defendant has pointed to any innocent, legitimate, non-destructive purpose that the device here could serve. "It is not a device that is commonly created for legitimate purposes, but the use of which may be perverted from that intended, ordinary purpose to an illegitimate end." Id. at 1146.

What is clear, contrary to defendants' contention is that semantical marriage to words is not the full answer and use of words like "weapons of war" "gangster-type weapons" do not resolve the issue. Here, without regard to intent, barrels of gasoline in conjunction with dynamite and the triggering components and connections clearly come within the statutes as construed and applied in the cases noted. Simplistically arguing a case of dynamite ignores the presence of the gasoline. As intention is not essential to transform the materials here into a device within the statute, that is, clothed with inherently destructive qualities, the materials are inherently of that quality and character. That a soldier would be unlikely to carry a barrel of gas and a supply of dynamite into battle is determinative. These were large incendiary bombs that were suitable only for arson. As assembled, the materials had all of the characteristics of 26 U.S.C. 5845(f)—Explosive, Incendiary, Bomb.[24]

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[24] Bomb—A hollow, projectile of iron, generally spherical, containing an explosive material which is fired by concussion or by a time fuse, . . . [and] any similar receptacle of any shape containing an explosive; as a dynamite bomb. Funk & Wagnalls New Standard Dictionary of the English Language.

While the components each have a legitimate use, together they have none. So in a Molotov cocktail, the bottle, the gasoline, the rag, and the match, each separately have innocent purposes, but together they have none such at all.

POINT VI

Certificates of National Firearms Registry custodian constituted proper proof of non-registration.

The proof of non-registration of the destructive device, an element in Count 4 charging possession and receipt of an unregistered firearm (destructive device) [25] consisted of ten (10) certificates, one in the name of each of the nine defendants plus John Shaw, from the National Firearms Registration & Transfer Record. Exhibits 131-140. The certificates state the absence of registration in the present tense. Defendants argue that proper proof would have been in the present and past tense, i.e., to include March 1, 1975 and prior thereto. Certificate is also argued to be insufficient in referring to the defendant Peter Betres without an address being listed for him.[26]

By simply referring to the one of registration in the name of Peter Betres, the evidence is all-inclusive, i.e., it

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[25] Made unlawful by 26 U.S.C. 5861.

[26] The Custodian of the National Firearms & Transfer Record (specified by Section 5841(a) as the location of the registration) certified that he "found no evidence that the firearm described below is registered to, or has been acquired by lawful making, transfer or importation by . . ." (the word "by" is then followed in each of the certificates by the name of one of the defendants plus John Shaw). See Exhibits 131-140. The description in each certificate corresponded to the Indictment as it set forth "a destructive device consisting of dynamite, detonating or primer cord, blasting caps and gasoline."

evidences the absence of any one by the name of Peter Betres. It follows that it excludes registration having been accomplished by or in the name of each, every and any particular Peter Betres, including the defendant herein, Peter Betres of Butler, Pennsylvania. Evidence of broad, total exclusion of registration in a particular name is clearly evidence of the narrower fact included therein, exclusion of registration by a particular Peter Betres as a matter of logic. It would be different if the certificate had been offered to prove that a defendant committed an act for then it could be argued that without greater specificity the mere name might apply to many persons of the same name, though that registration would have at least some weight. *Wigmore on Evidence*, 3rd Ed., Sections 413, 270, 2529. In short, the Government has here offered not merely evidence of the absence of registration by defendant Peter Betres, but evidence of an absence of registration by anyone, wherever they may reside, i.e., by everyone by the name of Peter Betres. See *Wigmore, supra*, Section 1633(c); *Federal Rules of Evidence*, Section 803(10).

The claim as to the tense of the certificate is likewise without merit and without citation of authority to sustain it. The Secretary of the Treasury was required to maintain a central registry of firearms to contain, as to each firearm registered (with exceptions not relevant here), its identification, date of registration and name and address of the lawful possessor. 26 U.S.C. 5841(a). In subsequent sections the statute requires (1) initial registration by the manufacturer, importer or maker and (2) registration of a transfer by the transferor. Section 5841(b). Clearly the plan is for a continuing registration of each firearm from its creation, manufacture, making or importation. There is no provision for termination of a registration, thus even when there is a

transfer there is no provision for destroying the original registration. See 27 C.F.R. Part 179. The preserved original registration and any transfers provide a history of each firearm and an authentication of its current legal possession by the requirement that the transferor register a transfer. 5841(b). The transferee cannot register a transfer and thus presumably no fraud can be perpetrated. *Milentz* v. *United States*, 446 F.2d 111 (C/A 8, 1971). Thus a certificate of non-registration is proof that in the registry, as of a specific date, there is no evidence that there has ever been a registration of the information as to the particular firearm and that there continues to be no such registration up to the date of the certificate. Had a defendant in this case ever registered the firearm in question as is required of a manufacturer, importer or maker, see 5841(c), that registration would continue from its inception to the present, even if a transfer had been accomplished. A certificate of the present status of the registry therefore, discloses any registration ever performed, and a certificate of non-registration is proof that the registration described in the certificate, of a particular firearm by the particular individual having legal possession thereof, was never performed and thus does not exist.

POINT VII

The charge on the interstate travel violation was correct without detailed instruction on the elements of the Connecticut arson statute.

Appellant Coffey asserts that in merely reciting the precise language of Conn. Gen. Stat. § 53A-113 (Third Degree Arson), Judge Newman insufficiently instructed the jury on the constituent elements of the crime of arson in Connecticut (Appellant Coffey's Brief, P. 26).

This, it is argued, constituted a failure to advise the jury of one of those elements of the Government's case about which the jury had to be certain beyond a reasonable doubt before rendering a guilty verdict under 18 U.S.C. § 1952. The instructions given, Appellant concludes, produced the effect of an impermissible partial direction of a guilty verdict, and were therefore plain error. Appellant's argument is fatally flawed by his unstated, yet inherent assumption that the elements of the State offense underlying a Travel Act indictment comprise an additional, indispensable element of the Federal offense. This proposition, at the very core of Appellant's argument, flies in the face of virtually every decision heretofore rendered on the role to be played in Travel Act offenses by the underlying State statutes, ignores the legislative history of 18 U.S.C. § 1952, and derives no support whatsoever from the cases cited by Appellant. It should be noted that no defendant requested such a change.

Six Circuits have confronted the issue of whether violation of a state statute to which reference is made in a prosecution under 18 U.S.C. § 1952 is an essential element to be proved in a Travel Act prosecution. All six have considered and rejected arguments virtually identical to those proferred by this Appellant, deciding instead that the State offense is not an essential element, but "merely serves a definitional purpose" *United States* v. *Conway*, 507 Fed. 2d 1047, 1051 (5th Cir., 1975), or is, in the words of the 7th Circuit, "only evidentiary and indicative of the element of intent in the Federal offense". *United States* v. *Rizzo*, 418 Fed. 2d 71, 80 (7th Cir., 1969), *cert. denied, sub nom Tornabene* v. *United States*, 397 U.S. 967 (1970) According to the 8th Circuit,

> "Consummation of the State substantive offense is not the indispensable gravamen of a conviction under Section 1952. Reference to State

> law is necessary only to identify the *type* of unlawful activity in which the accused was engaged."

McIntosh v. *United States*, 385 Fed. 2d 274, 276 (8th Cir., 1967) (Emphasis supplied). The 4th Circuit has agreed, ruling that:

> "Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in Section 1952."

United States v. *Pomponio*, 511 Fed. 2d 957 (4th Cir., 1975).

In *United States* v. *Prince*, 515 Fed. 2d 564 (5th Cir., 1975), appellants had been convicted for conspiracy to engage, and engaging in interstate prostitution activities in violation of 18 U.S.C. § 1952. The 5th Circuit Court of Appeals rejected appellants' argument, writing

> "This Court has recently held however that in § 1952 cases state law 'merely serves a definitional purpose' ". [*United States* v. *Conway*, *supra*] "There is no need to prove a violation of the state law as an essential element of the federal crime and therefore the failure to define a generic term according to state law is not error. . . . We need not concern ourselves, then, with the lack of a definition of 'prostitution' within the West Virginia statute. That term is also a generic term and the definition of the trial court 'sexual intercourse for hire' sufficiently described the offense. It is therefore unnecessary for us to decide the constitutionality vel non of the statute." *Id.*, 566.

United States v. *Conway*, *supra*, is most apposite to the present case, and conclusively demonstrates that there is nothing peculiar to arson as distinguished from

the other "unlawful activities" enumerated in the Travel Act, that raises the underlying state arson violation to the level of an indispensable element of a prosecution under 18 U.S.C. § 1952. In that case, the defendant was convicted of traveling in interstate commerce with intent to promote the unlawful activity of arson in violation of Maryland laws and thereafter performing acts to facilitate said unlawful activity in violation of 18 U.S.C. § 1952(a)(3). On appeal appellant asserted that the trial court's refusal to define arson under Maryland law constituted a failure to submit to the jury an essential element of the offense charged, and was consequently grounds for reversal. The court rejected this argument, materially indistinguishable from that made by appellants in the present case, ruling that

> ". . . in § 1952 cases state law merely serves a definitional purpose. 'Arson' is a commonly used and understood word. There was sufficient evidence upon which the jury could find that the appellant traveled in interstate commerce with intent to bomb and/or burn a Maryland building. *There is no requirement that the jury be instructed on the Maryland definition of arson*, and there is no reversible error here."

United States v. *Conway*, *supra*, at 1051-1052 (emphasis supplied).

The Supreme Court's ruling in *United States* v. *Nardello*, 393 U.S. 286 (1969), provided the analytical foundation for *United States* v. *Conway*, *United States* v. *Prince*, and the other cases cited above. After an extensive review of the legislative history of 18 U.S.C. § 1952, the court (in opinion written by Chief Justice Warren) held that

> "Although only private individuals are involved, the indictment encompasses a type of activity *gen-*

> *erally known as extortionate* since money was to be obtained from the victim by virtue of fear and threats of exposure. In light of the scope of the congressional purpose we declined to give the term 'extortion' an unnaturally narrow reading, [citation omitted] and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act."

United States v. *Nardello*, *supra*, at 296 (emphasis supplied). By the same token, and fortified with the ruling in *United States* v. *Conway*, it is clear that Judge Newman committed no error in refusing to instruct the jury as to the elements of the crime of arson under Connecticut law, a crime, after all, which was not charged against the appellants. "It is sufficient for the acts to fall within the 'generic term' charged." *United States* v. *Prince*, *supra*, at 566. "Arson" is such a generic term, and Judge Newman's instructions that arson had been committed if the defendant had "recklessly cause[d] destruction of a building of his own or another by intentionally starting a fire or causing an explosion" Tr., at 10,935 sufficiently described the offense referred to, but not charged, in the indictment of Appellants under 18 U.S.C. § 1952.

None of the decisions cited by the Appellant lends support to his argument that the constituent elements of the referent state violation are essential elements of a Travel Act prosecution, and must therefore be identified and given exhaustive exposition by the Court in charging the jury. The issue is whether violation of the underlying state statute amounts to such an indispensable element. The Supreme Court and six Circuits tell us it does not. Appellants' authorities merely hold that failure to instruct the jury upon one or more of the essential elements of a crime requires reversal, a proposition with

which the government wholeheartedly agrees. None of Appellant's cases arose under the Travel Act or any analogous federal statute containing reference to state offenses.

Appellant has understandably chosen to ignore the legislative history of 18 U.S.C. § 1952, for that history renders the interpretation of the Act appellant would have the Court adopt in fashioning its jury instructions thoroughly irrational in light of the Act's purpose. The Travel Act was primarily designed to impede the "clandestine flow of profits" and to be of "material assistance to the states in combating pernicious undertakings which cross state lines," including the activity generally known as arson. See S. Rep. No. 644, 87th Cong., First Sess., 4 (1961); H.R. Rep. No. 966, 87th Cong., First Sess., 4 (1961); and H.R. Rep. No. 264, 89th Cong., First Sess. (1965). The Congressional judgment was that certain activities in violation of state law had become a problem of national dimensions and required legislative response of commensurate scope. Were prosecution under 18 U.S.C. § 1952 to be so inextricably tied to the terminological and structural oddities of diverse and frequently anomalous state statutes, the result would be to eviscerate the Travel Act, leaving its efficacy utterly dependent upon the accident of which state lines the criminal happened to cross with intent to engage in that activity known generally as "arson". Congressional intent surely was to aid local law enforcement officials combat the evil of arson, and not to eradicate only those arsons which any given state has chosen to denominate "arson". It is inconsistent with what Congress had in mind in drafting 18 U.S.C. § 1952 to designate as a fundamental element of the crime the formal violation of the underlying state statute. Therefore, it is not necessary for the trial court in a Travel Act prosecution to instruct the jury on the constituent elements of the referent state offense, and Judge Newman's refusal to do so constituted no error.

POINT VIII

In the denial of mistrials as to Counts Three and Four the Court properly exercised its discretion.

The length of a jury's deliberations, and the decision to grant or deny a mistrial in relation thereto are matters left to the discretion of the trial court. The Government contends that the defendants have shown no abuse of discretion in Judge Newman's handling of these questions.

Trial below began on October 5, 1975 and the case was submitted to the jury on January 14, 1976. Guilty verdicts against defendant Peter Betres were returned by the jury, with respect to Counts 1 and 2, on January 29, 1976. At the same time the jury reported that they were deadlocked on Counts 3 and 4. The trial court then gave a modified "Allen" charge.[27] The jury resumed its deliberations and four days later, on February 3, 1976 it returned guilty verdicts against Peter Betres on Counts 3 and 4. The Court refused at that time and prior thereto to grant a mistrial as to Counts 3 and 4.

There were four counts and nine defendants in this case, many with different participations. There were distinctions among the elements of the four counts. Some defendants were implicated on an aiding and abetting theory.[28] 18 U.S.C. 2. Judge Newman was clearly acting within his discretion in giving the modified "Allen" charge[29] when the partial deadlock was reported. The

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[27] *United States* v. *Allen*, 164 U.S. 492 (1896).

[28] This is not a simplistic theory and the jury labored conscientiously, asking several times for clarification on this issue from the Court. See Tr. pp. 11063, 11155, 11175, 11194 and 11241.

[29] Defendants appeal neither the substance nor the fact of the "Allen" charge.

jury thereupon took four additional days of deliberation before reaching verdicts of guilty on the two additional counts as against Peter Betres. Certainly this was reflective of thoughtful consideration that would negate any inference of a coercive effect from the charge. See *United States* v. *Barash*, 412 F.2d 26, 32 (CA 2, 1969), *cert. denied*, 396 U.S. 832 (1969),[30] nor in *United States* v. *Diamond*, 430 F.2d 688 (CA 5, 1970) (a series of statements found to be coercive). In *United States* v. *Waltham*, 447 F.2d 894 (CA 5, 1970), and *United States* v. *Flannery*, 451 F.2d 880 (CA 1, 1971), similar judicial comments were discussed but both of these cases were reversed on other grounds.

As stated in the *United States* v. *Calabro*, 467 F.2d 973, at 987 (CA 2, 1972), *cert. denied, sub nom. Tortorello* v. *United States*, 410 U.S. 926 (1973); *Conforti* v. *United States*, 410 U.S. 926 (1973), and *Picciano* v. *United States*, 410 U.S. 926 (1973), *reh. denied*, 411 U.S. 941;

> "Motions for severance and mistrial are directed to the sound discretion of the trial court

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[30] As further reflective of the lack of any coercive effect, at the time of the further guilty verdicts against Peter Betres, the jury rendered a verdict of acquittal on the one count then pending against the defendant Ronald Betres. In addition, the jury's previously reported deadlock persisted as to the remaining counts against Just and Coffey and was reported as a solid deadlock situation on February 5, 1976. The deadlock remained on the charges against Michael Tiche and was ported as a final deadlock on February 11.

The record contains nothing that even approaches the abuses for which the courts in the cases cited by the defendant have found error. The court below made no such comment as found improper in *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir., 1971),

> " . . We have a substantial backlog of work, and to spend another day before another jury retrying this case just doesn't make sense to me."

Opper v. *United States*, 348 U.S. 84 (1954); *United States* v. *Marshall*, 458 F.2d 446 (CA 2, 1972); *United States* v. *Kompinski*, 373 F.2d 429 (CA 2, 1967); *United States* v. *Bentvena* [319 F.2d 916 (CA 2, 1963), *cert. denied sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963)]"

Reversal is required only if there is an abuse of discretion on the part of the trial court. *United States* v. *Marshall, supra*, at 451. Judge Newman's conduct had no abusive quality in the trial below. Defendant cites no case for a holding that the conduct of the trial court in the case at bar was beyond his discretion.

The jury's ability to decide this case intelligently and fairly, even after the report of the deadlock on January 29, 1976, is clearly demonstrated by the record. The jury acquitted Ronald Betres on the possession and receipt of an unregistered firearm count on February 3, 1976. They reported firm deadlocks on the two remaining counts against Just and Coffey on February 5 and on all counts against Michael Tiche on February 11. This clearly reflected careful deliberation resulting in distinction of result as among the defendants.[31] This clearly demonstrates a conscientious assessment of the evidence against each defendant in relation to the elements of the charges against each defendant.[32] Defendant presumes the jury's

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[31] See *United States* v. *Corr*, CA2-1976, Slip Op. Sept. Term 1975, 5891, 5912, decided October 22, 1976.

[32] While Just, Ronald Betres and Coffey were all shown to have been together at the Holiday Inn and in the plant in the abduction and removal of the plant personnel immediately prior to the setting of the explosions, Just was shown to have previously cased the plant and discussed the date of the operation with the defendant Dennis Tiche. Defendant Coffey inferably arranged the rental of the truck since the rental contract was described as having been signed in his handwriting. Ronald Betres on the other hand, was not the subject of any evidence implicating him prior to his arrival at the Danbury Motel.

inability to "weigh with impartiality and recall the claims of defendants." Peter Betres' Brief, p. 35. Their recall and assessment enabled them to reach the varied results among the five defendants after the January 25 report. As defendant points to no coercion of the jury, his argument in effect calls for a speculation of the jury's inability to function. Lacking any firm showing of impropriety, this Court should not speculate on any such inability but should sustain the trial court's use of its discretion.

POINT IX

The government's summation was not a basis for dismissal or a new trial.

A. The references were not intended and would have been taken as reference to defendants but rather to counsel. The references were fair comment on the strength of the government's case on issues raised in their defenses or in argument by defendants or their attorneys.

Appellants attack the Government's summation, essentially in the rebuttal.[33] [34] The points raised are as follows:

A. PETER BETRES

(1) Comment was made that there was no evidence of a consummation of any printing press sales. Betres had offered evidence of owning

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[33] Two references are made to the original summation. At Tr. 10733 there was simply an attempt to clarify the source of defendant Connors' statement which was read to the jury. The comment at Tr. 10737 simply was an argument for the strength of the Government's evidence.

[34] The entire rebuttal is found at Tr. 10845-10897.

printing presses. Bubar had offered evidence that he used printing equipment in his church activities. Limited evidence having been offered, comment was made that the evidence was weak and not supportive of the claim that Bubar and Betres were dealing in printing presses. Such a comment was hardly out of order. A consummation of such a sale, the delivery of any printing presses sold, if true, could have been the subject of testimony from a witness such as Mr. Betres had offered, Albert Lantz, who had testified to Betres' printing activities or from one such as testified from among Bubar's church from whom testimony had been obtained as to the printing that was done there, or from a trucker or the records of a trucker who might have moved and delivered any such printing presses, none of which testimony would have required Peter Betres to take the stand.

(2) The same general character of comment is found as to the evidence offered by Betres with respect to an alternative to his being in the LaGuardia Airport on February 28 at 9:30 P.M. to meet Shaw and the Tiches, as Shaw had testified. Betres offered evidence of an Allegheny Airlines flight to Pittsburgh at 10:05 P.M. from the Kennedy Airport. Betres had stipulated that he was in Connecticut on February 28, 1975. The comment of the Government was again directed to the weakness of such a claim. Evidence of Betres being on such a flight, if indeed he was on it, could have been offered by an airline ticket record in Betres' name or in his name being found on the flight roster, procedures readily avail-

able to him but not taken by him. See *United States* v. *Deutsch*, 451 F.2d 98, 117 (CA 2, 1971), *cert. denied*, 404 U.S. 1019; *United States* v. *Espremera*, 531 F.2d 1103 (CA 2, 1975).

In effect the comment pointed out to the jury that the defendant Peter Betres had gone only so far in offering evidence to support his claim that he was not at LaGuardia Airport at the time claimed, but rather was on another flight.

In each instance of the Government's comment (amplified in the first instance at Tr. 10885 with reference made to a contradiction to the Betres claim as to his transactions with Rubar), what was said in summation was fair comment on an issue raised in the defense. Such was perfectly proper under the circumstances. *United States* v. *Ong* (CA 2, 1976), Slip Op. Sept. Term 1975, 5517, 5537; *United States* v. *Tramunti*, 513 F.2d 1087, 1119, (CA 2, 1975); *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (CA 2, 1974); *United States ex rel. Leake* v. *Follette*, 418 F.2d 1266, 1268-70 (CA 2, 1969).

B. RONALD BETRES

(1) The Government's witnesses identified fingerprints including those of Ronald Betres as having been found in Room 118 at the Danbury Motel a few days after the fire. Ronald Betres argues that the Government should not have pointed to the lack of contrary testimony and the lack of any questions of the fingerprint expert. See *United States* v. *Grammer*, 51[illegible] F.2d 673, 676 (CA 9, 1975); See *United States* v. *Hager*, 505 F.2d 737, 740 (CA 8,

1974). *United States* v. *Gimelstob*, 475 F.2d 157, 163 (CA 3, 1973), *cert. denied*, 414 U.S. 828, *reh. denied*, 414 U.S. 1028. The argument was clearly a rhetorical device intended to emphasize the strength of the Government's evidence, the uncontradicted fingerprint testimony. The record will disclose that the observations were accurate and they are not questioned on that score. It is proper to argue the strength of one's case as here by pointing to the fact that it stands uncontradicted and unquestioned. See *United States* v. *Hill*, 508 F.2d 345, 347 (CA 5, 1975); *United States* v. *Pritcharo*, 458 F.2d 1036, 1040-1041 (CA 7, 1972), *cert. denied*, 407 U.S. 911 (record did not show that no one but defendant could have contradicted the evidence commented on). Ronald Betres could have offered alibi testimony if he contended that he was not in the Danbury Motel at the time in question, or motel employees that he was not there, if true.

(2) Ronald Betres also argues that there was impropriety in referring to the absence of an explanation of a phone call. See *United States* v. *Anderson*, 481 F.2d 685, 701 (CA 4, 1975), *aff'd*, 417 U.S. 211. That comment had followed upon a reference to Mr. Coffey. See Tr. 10891. Both references were intended to pertain to the arguments of counsel that had previously been made. Throughout the Government's argument, it was made clear that the rebuttal was in response to the arguments of all counsel for the defendants. Thus the statement "Mr. Coffey refers . . ." and the "Ronald Betres [has not explained]" were both intended to pertain to the claims of counsel in argu-

ment. Mr. Coffey had not testified and Mr. Bowman had argued for him. Mr. Neigher had argued for Ronald Betres, seeking to explain away the evidence against his client. During the course of it, no reference was made to the phone call evidence. Thus the comment by the Government was again seeking to emphasize the strength of its evidence as to which there had been no explanation in argument. *United States* v. *Thundershield*, 478 F.2d 241, 243 (CA 8, 1973), *cert. denied*, 414 U.S. 851; *United States* v. *Reid*, 415 F.2d 294 (CA 5, 1969), *cert. denied*, 397 U.S. 1022. Clearly this did not call for Ronald Betres to testify. The test is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States ex rel. D'Ambrosio* v. *Fay*, 349 F.2d 957, 961 (CA 2, 1965), *cert. denied*, 382 U.S. 921. See *Knowles* v. *United States*, 224 F.2d 168, 170 (CA 10, 1955): *United States* v. *Lipton*, 467 F.2d 1167, 1168 (CA 2, 1972).[35] The phraseology was a clear and implicit, if not explicit, effort to refer to the fact that the phone record stood uncontroverted, placing Ronald Betres on the New Jersey Turnpike at a time when John Shaw had placed him there en route back to Pittsburgh from the Shelton fire scene. Taken in the context of the entire argument, the meaning ascribed to it by defendants reflects no more than ambiguity.

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[35] Had he wished and been able to do so, Ronald Betres could have called an alibi witness to place him elsewhere at the time of the telephone call, or to offer evidence from the recipient of the phone call exonerative of him.

C. ANTHONY JUST

Anthony Just has not pointed to any specific comment adverse to him, but rather asserts impropriety in the "whole theme" of the argument and the trial judge's response in the form of curative instructions. Indeed his argument attempts to characterize the Judge's reaction to the situation from the language used. No such theme was intended or is found in the argument. No authority is cited by the defendant Just as requiring action in favor of a defendant who is not the subject of either a general nor specific comment.

D. DAVID BUBAR

Bubar argues that impropriety in an observation that starts "Now Mr. Zalowitz said to you . . . that somebody has made a sucker . . . of Mr. Bubar." The observation ends "There has been no refutation of the thrust of the Government's case insofar as the defendant Bubar is concerned." The summation followed upon the argument of Mr. Zalowitz. The reference was, again, to the strength of the Government's case. There was indeed no reference to any specific evidence but rather to the "thrust of the Government's case." The observation, both in its wording, its context and its timing clearly suggests that Mr. Zalowitz' argument had in no way blunted the Government's case against Bubar. The context clearly suggests that what the writer intended to say was that Zalowitz argued to the jury that Bubar had been made a sucker, but that that characterization was not the question for the jury's consideration but rather what they should consider was the evidence as to Bubar's

involvement in the crime, and that the evidence against him had in no way been countered by Zalowitz' argument that Bubar had been made a sucker. See *Lipscomb* v. *Estolle*, 507 F.2d 708, 710 (CA 5, 1975); *United States* v. *Giuliano*, 383 F.2d 30, 33-34 (CA 3, 1967), *cert. denied*, 389 U.S. 1055; *Sanchez* v. *Helgie*, 531 F.2. 964, 967 (CA 10, 1976). Again there was no possible implication nor reference concerning Bubar's failure to testify.

E. DENNIS TICHE

Dennis Tiche testified in his own behalf. On cross-examination he admitted, as a bank record showed, that he had deposited $1,000 in cash in his bank account three days after the fire.[36] Likewise, Tiche had testified that no phone calls as were proven by telephone company records had been received at the Gatti Chemical Company on February 21, 1975. Yet he and his girl friend, Marie Fobes, had been present during that period of time. He also offered evidence of receipts for trips which he claimed to have taken and which precluded his involvement in this case at various relevant times. Yet for a trip that he claimed to have taken on February 17, 1975, a crucial date since it was the subject of testimony that he had been in Shelton, Connecticut, with Anthony Just on that date, he had no such receipts. Lastly, he claimed that the trip that he had taken to New Haven was for a business pur-

[36] John Shaw had testified that Dennis Tiche received $3,000 from Peter Betres at the LaGuardia Airport on February 28, 1975 and had split that money with Michael Tiche and himself, $1,000 each that same night in New Haven.

pose and the registration under a false name at the Park Plaza Hotel was to insulate himself, Michael Tiche and John Shaw if they found some girls, ignoring the fact that John Shaw registered in his true name. To question the weight of all of that evidence, comments were made and were entirely proper. Once a defendant takes the stand, certainly his story is subject to comment as to its weaknesses, its inconsistencies, its illogic. See *United States* v. *Parness*, 503 F.2d 430, 437, n.10 (CA 2, 1974) *cert. denied*, 419 U.S. 1105; *United States ex rel. Burt* v. *State of New Jersey*, 475 F.2d 234 (CA 3, 1975) *cert. denied*, 414 U.S. 938; *United States* v. *Lancott*, 491 F.2d 312, 315 (CA 10, 1974); *Agnellino* v. *New Jersey*, 493 F.2d 714 (CA 2, 1974); *United States* v. *Ramirez*, 441 F.2d 950, 954, (CA 5, 1971) *cert. denied*, 404 U.S. 869, *reh. denied*, 404 U.S. 987. The summation as to Dennis Tiche is entirely in that vein. Tr. 10881-10885. Certainly there is no suggestion of a change of the burden of proof and since Tiche had testified there was no Fifth Amendment impropriety.

F. ALBERT COFFEY

The only item referred to by Mr. Coffey in his argument is the comment referred to above, "Mr. Coffey refers to various testimony. . . ." [37] Clearly that reference was a misstatement. Coming right after counsel's argument, certainly it can be said that only counsel could

[37] Appellant Coffey does point to several statements in the summation which refer to defendants Connors and Mueller (both of whom were acquitted) and to defendant Michael Tiche (as to whom the jury failed to agree).

"refer to various testimony". The comments which followed were clearly intended and did suggest the weight of the evidence against Coffey which was not refuted by his attorney's argument which had just been completed.[38] See *United States* v. *Anderson*, 481 F.2d 685, 701 (CA 4, 1973), *aff'd* 417 U.S. 211; *United States* v. *Reicin*, 497 F.2d 563, 572, *cert. denied*, 419 U.S. 996.

These were not remarks pointing to a defendant's failure to testify. *United States* v. *Fay*, 349 F.2d 957 (CA 2, 1965). None of the observations referred to evidence that the defendant Coffey alone could refute such as found in *United States* v. *Handman*, 447 F.2d 853 (CA 2, 1971).

B. No reference directly or indirectly called to jury's attention the failure of a defendant to testify.

In all of these cases, the intent was solely to comment on the strength of the Government's case and in response to arguments of counsel which raised factual issues concerning negative comments were entirely to demonstrate that it was in response to the arguments of counsel.[39] Taken out of context by defendants and isolated, there is

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[38] Even if taken as a comment on the lack of any contradictory evidence being offered by the defendant, it would not be improper as none of the evidence referred to was rebuttable solely by Coffey, if rebuttable at all. See *United States* v. *Hart*, 427 F.2d 1087, 1090 (CA 2, 1969).

[39] Tr. 10845, 10850, 10853 ("In the course of the arguments . . . the defendants have referred to . . ."). 10854 ("The contention that Peter Betres . . . got a limousine to New York in time to get to Kennedy Airport at 10 o'clock at night . . ."). "Now

[Footnote continued on following page]

a starkness to the statements made by the prosecutor which suggests a larger significance than they merit.[40] Isolated they are not part of the flow of the summation and they lose the quality of the surrounding references. Perhaps the best understanding of the context and the implication is to be derived from the trial court's instructions. Again the entirety of what the trial court said should be reviewed to comprehend its view of the summation and the corrective steps that the Court deemed to be appropriate and sufficient. Such an assessment will differ dramatically from the small portions quoted by the defendants to serve their purposes.

Mr. Sagarin you may recall when he discussed this made some reference 'well, the records are all destroyed'") 10861 ("arguments for the defendants have suggested"), 10862, 10863 ("the defendants themselves have made arguments and I would like to deal with what they have said"), 10865 ("you have Mr. Zalowitz' claim"), 10866, 10855 ("Many counsel have referred"), 10856 ("there was reference to the chemicals, . . . to Mr. Amatol,"), 10856 ("the defendants have suggested to you . . ."), 10866 ("Now Mr. Connors has attacked John Shaw insofar as some prior statements that were made . . ."), 10868 ("Now insofar as Donald Connors is concerned, one of the things Mr. Golub [his attorney] has alluded to . . ."), 10871-10872 (". . . Mr. Connors has not in any way adequately explained away the thrust of the Government's case, as Mr. Golub has made the argument . . ."), 10875 ("Mr. Craig was commendably candid in his argument"), 10877 ("Mr. Craig would suggest to you . . ."), 10878 ("Mr. Craig never made any mention in his argument about the airline tickets"), 10880 (". . . Mr. Craig has attempted to . . ."), 10881 ("Dennis Tiche has offered his testimony and claimed.... And Mr. Curtis [his attorney] said to you...") 10895 ("Mr. Clifford referred ... Here you have the argument of Mr. Clifford. He's at the Park Plaza "[obviously referring to defendant Michael Tiche, Clifford's client]."

[40] "This is especially true when the vast majority of the prosecutor's statements were properly directed at the evidence." *United States ex rel. Maisonet* v. *La Vallee*, 405 F. Supp. 925, 927, citing *United States* v. *Durham*, 319 F.2d 590 (CA 4, 1973). See *United States* v. *Stassi* (CA 2, 1976) Slip Op. Sept. Term 1976, 247, 255; *United States* v. *Cusumano*, 429 F.2d 378, 381 (CA 2, 1970).

If impropriety is considered to have occurred in the summation, it clearly was not a blatantly intentional effort to flag to the jury any defendant's failure to testify. These were not the intentional "inflammatory or insinuating questions and statements" found in *United States* v. *Burse*, 531 F.2d 1151 (CA 2, 1976), nor were they "pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential". *Berger* v. *United States*, 295 U.S. 78, 89 (1955). Neither were these incidents of personal conduct, offers of dubious evidence or questions, statements of belief or doubt, resort to the majesty of the Government to support the case (See *United States* v. *LaSorsa*, 480 F.2d 522, 526 (CA 6, 1972), or misrepresentation of testimony as in *United States* v. *Drummond*, 481 F.2d 62 (CA 2, 1973). They were not unfounded assertions of fact. *United States* v. *Bivona*, 482 F.2d 443, 445 (CA 2, 1973) (no prejudice found in the impropriety). They were not explicit references to a defendant's failure to testify. *Collins* v. *United States*, 383 F.2d 296 (CA 10, 1967); *Haberstroh* v. *Montanye*, 493 F.2d 483, 485 (CA 2, 1974) (harmless error in brief superficial comment not likely to have swayed the jury).

C. Any possible unfair effect on the jury was alleviated by prompt and repeated corrective instructions.

A full review (see joint Appendix, p. 124, et seq.) will reflect:

A. The Court found that there was no intentional pointing to the failure of any defendant to testify nor any effort to cast on any defendant a burden of proof in contradiction of the law.

B. The Court did not itself understand nor construe the summation to reflect on any defendant's failure to take the stand.

C. The Court was aware that an ambiguity was created by some of the wording of the summation which might have been taken other than as intended and thus reflected on such failure. The Court was of the opinion that the jury would not have thus understood the summation.

D. Considering the ambiguity, the Court immediately, sua sponte, instructed the jury that the references to lawyers and parties in summation was indeed intended to refer to the presentation of the lawyers in argument and was not to reflect on a defendant's failure to testify, a defendant's absolute right from which no adverse inference was to be drawn. The Court thereafter, upon affording defendants an opportunity to make motions, gave a requested instruction as received from the defendants to the effect that if the summation were taken to reflect on a defendant's failure to testify, the jury was not to draw any inference therefrom and that if the summation did so reflect, it would have been improper, uncalled for and illegal.[41]

It is submitted that such instructions were sufficient under the circumstances to put the matter to rest. *United States* v. *Pastore* (CA 2, 1976), Slip Op. Sept. Term 1975, 4307, 4313; *United States* v. *Conway*, 507 F.2d 1047, 1052 (CA 5, 1975); *United States* v. *Dioguardi*, *supra*, at 81; *United States* v. *Nasta*, 398 F.2d 283, 285 (CA 2, 1968); *Taglianetti* v. *United States*, 398 F.2d 558, 566 (CA 2, 1968); *United States* v. *Holland*, 378

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[41] The categorization of the last three words was requested by defendants and thus could not be considered to reflect the Court's view of the ambiguity. Judge Newman had stated his own views of the matter elsewhere in his comments to the jury and in his Memorandum of Decision noted above.

F. Supp. 144 (D.C.PA, 1974) aff'd, *Appeal of Ehly*, 506 F.2d 1050, 1053, *cert. denied*, 420 U.S. 994.

D. The length and careful consideration of the issues by the jury belie any possible adverse effect of the summation.

Thus the Court must, if it determines an impropriety occurred, determine whether there was a resulting manifest unfairness in the trial before it requires a new trial.[42] Perhaps the best indication that the jury was in no way improperly influenced by the summation is to be found in the small part that the statements consisted of in relation to the entire summation, the curative instructions of the Court, the character and extent of the jury's deliberations, the varied verdicts reached, no prejudice resulted to any of the defendants from the summation. *United States* v. *Ong*, *supra*, 5539; *United States* v. *Armedo-Sarmiento* (CA 2, 1976), Slip Op. Sept. Term 1976, 305, 316-317; *United States* v. *Elmore*, 423 F.2d 775 (CA 4, 1970), *cert. denied*, 400 U.S. 625.

POINT X

The sentences of Peter Betres were lawful and properly within the Court's discretion.

A defendant may be charged with both a substantive crime and a conspiracy to commit that crime. It is a fundamental principle, too settled to require explication, that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

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[42] Any error which does not affect substantial rights shall be disregarded. Rule 52(a), Federal Rules of Criminal Procedure.

Callanan v. *United States*, 364 U.S. 587, 593; *United States* v. *Becker*, 461 F.2d 230, 234 (CA 2, 1972); *United States* v. *Zane*, 495 F.2d 683, 692 (CA 2, 1974), *cert. denied*, 419 U.S. 895 (1974). See also *Pinkerton* v. *United States*, 328 U.S. 640, 643-644; and *Periera* v. *United States*, 347 U.S. 1, 11.

In *Ianelli, et al.* v. *United States*, 420 U.S. 770, 777-780 (1974), the Supreme Court reaffirmed the reasoning of *Periera* v. *United States, supra*, to the effect that the dangers of a conspiracy may have ramifications far beyond the immediate aim of the conspiracy and the acts committed to carry it out. "This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense". *Ianelli, supra*, at 778.

It follows that:

> ". . . It is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end."

Callanan v. *United States, supra; Pinkerton, supra; Carter* v. *McClaughry*, 183 U.S. 365 (1902). Indeed the court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose. *Clune* v. *United States*, 159 U.S. 590 (1895)." *Ianelli, supra*, at 777-778.

The decision to impose "an additional sanction for conspiracy" to commit a substantive offense falls within the sound discretion of the court, and "should be rendered in accordance with the facts and circumstances of a particular case." *Ianelli, supra*, at 791. Defendant has not claimed nor shown any abuse of discretion in the sentences imposed below. See *United States* v. *Tucker*, 404 U.S. 443, 447 (1971).

Betres was sentenced to consecutive terms for the conspiracy on the one hand, and the substantive offenses charged on the other. The sentences on the three substantive violations were not cumulated but all three were ordered to run concurrently.

Defendant argues that 26 U.S.C. 5871 is frustrated by the other sentences which preclude eligibility for early parole. The short answer to that argument is that more than one statute can be violated by a single act and where the offenses are not identical, cumulative sentencing is proper. *United States* v. *Clements*, 471 F.2d 1253, 1254 (CA 9, 1972); *Gore* v. *United States*, 357 U.S. 386 (1958), *reh. denied*, 358 U.S. 858; *Callanan* v. *United States*, *supra*. While *Clements* held that the various firearm offenses listed in 28 U.S.C. 5861 (and sub-paragraphs (c), (d), and (f)), did not justify cumulative sentencing, for want of a Congressional intent to such avail, an offense under 28 U.S.C. 5861(d) was not there held to be identical to a violation of 18 U.S.C. 1952, nor to a violation of 18 U.S.C. 844(d), each of which is committed by different acts, and thus different elements.

Thus the early parole chance of 28 U.S.C. 5871 is not controlling in the face of a violation of either of the other two substantive offenses, neither of which have such a provision as to parole.

As distinct offenses, the interstate travel to commit arson (18 U.S.C. 1952), the interstate transportation of dynamite (18 U.S.C. 844(d)), and the possession of an unregistered firearm 26 U.S.C. 5861(d) and 5871 are not merged. Even if they are, there is no authority precluding a cumulative sentence under the conspiracy

violation.[43] Defendants' citations neither apply to the substantive offenses here nor do they preclude a sentence for conspiracy cumulative to a sentence on a substantive offense. See *Ianelli* v. *United States*, *supra*. See also *United States* v. *DeNormand*, 149 F.2d 622 (CA 2, 1945), *cert. denied*, 326 U.S. 756, *reh. denied*, 326 U.S. 808, 326 U.S. 811, 327 U.S. 816, *cert. denied*, 330 U.S. 822, *reh. denied*, 330 U.S. 854.

Sentences within the statutory limits cannot be set aside on the ground that they were made to run consecutively which is a decision resting within the sole discretion of the trial judge. *United States* v. *Stein*, Slip Op. Sept. Term 1976, 211 at 221, decided October 22, 1976, C/A 2.

POINT XI

Bubar's claims of error are without merit.

Bubar's sentence was lawful: And a proper Exercise of discretion.

Defendant Bubar argues that his sentence was improper, comparing his sentence to that given others. No authority is cited. The sentencing determination of the trial court is a matter of discretion on the part of the trial judge who has heard the evidence, reviewed the pre-sentence report and heard counsel and defendant if he desires to be heard at sentencing. There is no con-

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[43] No authority is cited for a maximum sentence as claimed by the defendant when there are several charges such as here. Only in the clearest indication from Congress is consecutive sentencing to be precluded and the relationship between the offenses here do not so indicate. *United States* v. *Valot*, 481 F.2d 22, 27 (CA 2, 1973).

fusion as to the sentences of Peter Betres and Dennis Tiche. By a combination of consecutive and concurrent sentencing as among the four charges on which they were convicted, each received an aggregate sentence of fifteen (15) years. By a similar combining of consecutive and concurrent sentencing, defendant Bubar received an aggregate sentence of fifteen (15) years, the sentences on Count 4 being concurrent one to another, but the resulting ten (10) years under those two counts being made consecutive to the sentences on Counts 1 and 2. No argument is made other than that the disparity between the sentences adjudged as to Bubar is erroneous as different from the sentences adjudged as to defendant Dennis Tiche and defendant Peter Betres. Bubar was the subject of testimony which indicated that he initiated the destruction, paid money to the perpetrators, orchestrated it and was present up to nearly the trigger pull. He further, after the fact, attempted to fabricate an alibi. The total demolition that resulted merited a heavy penalty. No impropriety in the Court's decision is cited, either in relation to the statute or in relation to any Constitutional requirement. Only the result is attached in comparison to the sentences of others. As the sentence was well within the statutes, the discretion of the trial court should not be disturbed. *United States* v. *Stein*, CA 2, Slip Op., September Term 1976, 211 at 221, decided October 22, 1976.

Bubar's Bail Appeal is Moot

Bubar's claim for bail has no part in this appeal. It was previously argued on motion before this Court and decided. The issue was moot.

No impropriety in the Court's marshalling of the Evidence has been demonstrated

The marshalling of the evidence by the trial court is well within its authority and discretion, particularly in as long a trial as this one was. The argument of defendant Bubar simply refers this Court to the trial court's charge with no specifics as to any claimed deficiency. The argument is so vague that it cannot be met here, really. Clearly the factual issues were left to the jury. Taken as a whole, the Court's charge definitely attempted to balance the presentation and was well within the Court's discretion. *United States* v. *DiCanio*, 245 F.2d 713 (CA 2, 1957), *cert. denied*, 355 U.S. 874; *United States* v. *Bloom*, 237 F.2d 158, 163 (CA 2, 1956); *United States* v. *Dixon*, 469 F.2d 940, 942 n. 4 (CA DC, 1972).

Reference is also made to the Court's having admitted a statement made by the defendant Bubar after full warnings, and in his attorney's presence. That ruling has not been appealed and the reference to it in relation to the marshalling of the evidence is totally unclear. It should be disregarded.

Pre-trial publicity did not prevent selection of an unbiased jury

The matter of pre-trial publicity is not contested by any defendant other than Bubar. That publicity attended such a massive fire was involved in this case was, of course, inevitable. Bubar makes no showing that the jury was not fairly examined before selection nor that the jury was in any way biased. See *Viereck* v. *United States*, 130 F.2d 945 (DC, CA 1942), *rev'd on other grounds*, 318 U.S. 236; *United States* v. *Bletterman*, 279 F.2d 320 (CA 2, 1960); *United States* v. *Moran*, 194

F.2d 623 (CA 2, 1952), *cert. denied*, 343 U.S. 965; *United States* v. *Manfredi*, 488 F.2d 588, *cert. denied*, 417 U.S. 936.

The length of the jury's deliberations and the varied verdicts rendered by the jury ranging all the way from outright acquittals, through acquittals on one of the counts against a particular defendant, to total convictions demonstrates the fairness of the consideration given to each defendant by the jury. No record, either with respect to pre-trial publicity nor publicity in the course of the trial, has been presented by defendant Bubar to support his claim that anything short of a fair trial took place.

The Jury Selection Was Lawful

The trial was conducted by a jury selected in a manner approved by this Court. *United States* v. *Jenkins*, 496 F.2d 57, (CA 2, 1974), *cert. denied*, 420 U.S. 925. No one has the right to any particular makeup of a jury. *United States* v. *Fernandez*, 480 F.2d 726, 733 (CA 2, 1973); *Swain* v. *Alabama*, 380 U.S. 202. Certainly it follows that there is no right in a particular defendant to have a clergyman (of what faith one might ask) sit on a jury. There is no authority which entitles a defendant to a particular person or one of a group, or a representation of a group on the jury. All that is required is that the jury be drawn from a fair cross-section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522, 527 (1975). No clergyman was excluded from the jury. Defendant Bubar points to nothing in the record to sustain any such claim.

POINT XII

The limitation on Marley's redirect examination was correct as Rule 608(b)(2) limits such testimony to cross-examination.

Defendants assign error in the exclusion of questions directed to Loretta Marley as to the basis of her opinion of John Shaw's truthfulness. Defendant's claim is founded on a distorted reading of Rule 608(b)(2) of the *Federal Rules of Evidence.*

That section specifies that "inquiry" into "specific instances of conduct" may only be made upon *cross-examination.* (Emphasis added.) Ms. Marley was called as a defense witness, and as such her examination by defendants would be direct or re-direct examination, not cross-examination. As Rule 608(b)(2) authorizes cross-examination of a character witness about specific instances of conduct of another witness whose veracity is in question, the rule cannot be said to authorize such inquiry on direct or re-direct examination.

Marley was a defense witness. Cross-examination normally and properly is conducted by a party adverse to the party who called the witness. *National Mutual Casualty Company of Tulsa* v. *Eisenhower,* 116 F.2d 891 (Ca. 10, 1940); *Berwind-White Coal Mining Co.* v. *Firment,* 170 F. 151. Ms. Marley was certainly not an adverse witness to any defendant. To hold that questioning of her by a defendant other than the one who called her constituted "cross-examination" would condone the circumvention of the purpose of Rule 608(b)(2), which purpose was to insure that the "overriding protection of Rules 403 and 405 (of the *Federal Rules of Evidence*)" is not impaired. *See* Advisory Committee's Note to Rule

608(b)(2), 3 Weinstein Evidence 608-4 to 608-6. Rule 403 acts to guarantee that the probative value of collateral evidence is not to be out-weighed by danger of unfair prejudice, confusion of issues, or misleading of the jury. Rule 405, with specific reference to proof of character, is to the same effect.

Mr. Shaw's alleged subornation of perjury is unquestionably nor of such probative value as to warrant its admission into evidence. *See* the trial court's memorandum on defendant's motion for a new trial, Joint Appendix, p. 124 et seq.

It has been held that evidence of a witness' subornation of another's perjury would be inadmissible to impeach his general credibiiity. *United States* v. *DeSapio*, 456 F.2d 644 (2d Cir. 1972), *cert. denied*, 406 U.S. 933. There the court distinguished the *United States* v. *Haggett*, 438 F.2d 396 (2d Cir. 1971), upon which defendant relies, in that in the earlier case, admissibility was based upon a tendency of the evidence to show bias or prejudice on the part of the witness. *See United States* v. *DeSapio*, *supra*, at p. 648, n.1. *See also United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974).

An exploration of the collateral issue of Mr. Shaw's veracity would produce a side trial on the issue of his credibility contrary to Rules 403, 405 and 608(b)(2). *See Weinstein Evidence*, *supra*. Rule 608(b)(2) has specifically left it to the "discretion of the court" to balance the dangers of admitting collateral evidence against its probative value. *See* Reports of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., No. 93-650, Nov. 15, 1973, p. 10, where the judiciary committee notes its amendment of the Supreme Court's proposed Rule 608(b) so as to "em-

phasize the discretionary power of the court in permitting such testimony . . .". *See also Alford* v. *United States*, 283 U.S. 687, 694 (1930); *United States* v. *Dorfman*, 470 F.2d 246 (2d Cir. 1972); *United States* v. *Kahn*, 472 F.2d 272 (2d Cir. 1973). The trial court's exercise of its discretion in excluding the additional testimony sought to be elicited from Ms. Marley was correct, having particular regard to all of the attacks otherwise made on Shaw's credibility. See Joint Appendix, pp. 132-133.

POINT XIII

The rulings on evidence were correct.

A. Southern Supply checkbook

The checkbook of the Southern Supply Company, Exhibit 99, was offered by the Government along with checks written from that book and bank records pertaining to the account, Exhibits 90-101 inclusive, to prove the deposit of the money received by defendant Bubar from defendant Mueller and disbursement of much of that money to defendant Betres. There was no testimony about the checkbook except that the handwriting was that of Bubar. Tr. p. 6716-6717. It was produced in response to a subpoena (Exhibit 102) as the checkbook of Southern Supply Company. Its authenticity was not challenged. Tr. 6212.

The book was offered and admitted as documentation of a statement or verbal act made during the court of [44] and in furtherance of the conspiracy. Tr. p. 6212-6218.

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[44] The pertinent entries are bracketed in the book by entries dated within the existence of the conspiracy.

Defendant characterizes the book as a confession. It has no such characteristics. It was not offered nor admitted as such against Bubar. It would thus not be controlled by *Bruton* v. *United States*, 391 U.S. 123 (1968) since that case applies only to a co-defendant's confession implicative of a defendant after the commission of the crime has been completed.

The checkbook was admissible as a statement[45] or verbal act by a co-conspirator made during the course and in furtherance of the conspiracy. Rule 801(d)(2)(E), *Federal Rules of Evidence*. *Anderson* v. *United States*, 417 U.S. 21 (1974); *United States* v. *McLean*, 528 F.2d 1250 (CA 2, 1976); *United States* v. *Armaoa-Sarmiento*, (CA 2, 1976), Slip Op. Sept. Term 1976, 305, 321; *United States* v. *Manarite*, 448 F.2d 583, 590 (CA 2, 1971), *cert. denied*, 404 U.S. 947 (1971). The argument that the right to confront witnesses invalidates the co-conspirator statement exception to the hearsay rule was not clearly decided in *Bruton*, *supra*, at 128, n.3, but was laid to rest by the upholding of the admission of the co-conspirator's statement in *Dutton* v. *Evans*, 400 U.S. 74, 80. See also *Campbell* v. *United States*, 415 F.2d 356, 357 (CA 6, 1969); *United States* v. *Projansky*, 465 F.2d 123, 138 (CA 2, 1972), *cert. denied*, 409 U.S. 1006 (1972).

In any event, the checkbook was cumulative in that it corroborated checks which were not only demonstrated to have been made payable to Peter Betres, but to have been disposed of by him through his own banks. 329.

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[45] That the checkbook was in written form should not distinguish it from an oral statement since Rule 801(d)(2)(E), *Federal Rules of Evidence*, refers to a "statement" which is defined, for purposes of Article VIII of the Rules as "an oral or written assertion." Rule 801(a), *Federal Rules of Evidence*.

B. Impeachment of Albert Lantz

The witness Albert Lantz offered testimony to counter the identification of Peter Betres, (he owned no such coat as he was described as wearing at a particular occasion), and that he had printing presses (dovetail with the testimony of defendant Bubar on their dealings, i.e., that they related to purchases (by Bubar) and sale (by Betres) of printing presses. TP 9136. On cross-examination, Lantz was asked about his convictions of armed robbery and two counts of burglary, the type of act referred to by then Judge Berger in *Gordon* v. *United States*, 383 F.2d 936, 940 (CADC, 1963), *cert. denied*, 390 U.S. 1029. The record notes the conviction with imprisonment to June 1966. TP 9316, 9319. The admissibility under the language of the rule is conceded. *Rules of Evidence*, Rule 609.

The trial court noted that the testimony of Lantz, on direct, dealt with two crucial aspects of the case and found that the probative value, i.e., the impeaching effect, outweighed any prejudice. Specifically, the trial court noted that the more significant the testimony of the witness on direct, the greater the significance for probative value of the impeachment of the witness giving the testimony. The probative value measure used by the trial court was simply a logical one, i.e., a measure of the overall impact, weight and merit of the impeachment as evidence. This is nothing but an application to the case of the balancing function of the trial court dictated since *Luck* v. *United States*, 348 F.2d 763 (C/A D.C., 1965). The rule is one of admissibility unless the trial judge finds resulting prejudice to outweight the value of the impeachment. See *United States* v. *Palumbo*, 401 F.2d 270, 273 (CA 2, 1968), *cert. denied*, 396 U.S. 947; *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (CA 2, 1974), *cert. denied*, 416 U.S. 956. It should be noted

that the impeachment in this case was directed to a witness and not to a defendant and thus the prejudice, since it in no way kept the witness off the stand, was not directed to the defendant himself personally, and did not keep the defendant off the stand, would be of considerably less significance. See 3 Weinstein, *Evidence* 609-76.

The Court's discretion was properly exercised in this case and in any event the significance of the Lantz testimony, as thus impeached, could not have resulted in any prejudice to defendant Peter Betres.

C. Telephone Records

The telephone records admitted were of various phones to which one or more of the defendants had access. These included the phones at the residence of defendants, Peter Betres, The Alhambra Hotel, Bubar's hotel and offices. They also included phones at which witnesses placed one or more of the defendants.[46]

The records were admitted to show that calls were made at certain times and between certain places. *See* Exhibit 141. CTP 5994-6063 (particularly 6057-6063). TP 10,741-10, 746.[47] Thus it was of significance that a call from Howard Johnson's, or Zayre's, was made at a time when Peter Betres was there, to telephones at the Gatti Chemical Company (Dennis Tiche's place of business) or to the Danbury Motel (where Coffey, Just and Ronald Betres were described as hanging around or on

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[46] Peter Betres stipulated his presence where two phones were located, Howard Johnson's in Derby, Connecticut, and Zayre's Store, also in Derby, further stipulating to receiving and making phone calls from the former.

[47] Contrary to defendant Peter Betres' claim, nowhere is there reference in the argument to the substance of the calls.

the phones). In some instances the sequence of calls, or return of calls is of moment. There was no claim as to the content of calls. In short, their admission was to prove access and to corroborate other testimony about calls being made and persons being present. How likely, for example, would such calls be made without some corollation to the parties here since the parties have an otherwise established relationship. For example, if a call is made from a phone accessible to Betres to his hotel, The Alhambra in Butler, Pennsylvania, and approximately at the same time to the Danbury Motel, to the Gatti Chemical Company, also about the same time, it could be inferred that these were the calls that Betres admitted or was shown by other evidence to have made. The network of calls buttresses the admission of all of the records. *See United States* v. *Young*, 470 F.2d 962, 964 and cases cited (CA 9, 1972), *cert. denied*, 410 U.S. 967 *reh. denied*, 411 U.S. 840; *United States* v. *Whitaker*, 372 F. Supp. 154, affd. 503 F.2d 1400, *cert. denied*, 419 U.S. 1193; *United States* v. *Gallo*, 125 F.2d 229 (CA 2, 1941); *United States* v. *Kompinski*, 373 F.2d 429 (CA 2, 1967).

POINT XIV

The Court did not err in rulings in the retrial of Michael Tiche.

A. Date of the retrial did not constitute a failure of a speedy trial.

Appellant Michael Tiche was tried in the District Court for Connecticut where a mistrial was declared on February 11, 1976 as a result of the jury deadlock. On June 7, 1976, retrial was commenced in the Northern District of New York before Judge Henry Werker of the Southern District who was specially assigned on April 22, 1976 to try this case in the Northern District.

Immediately upon the mistrial, the Government announced, on the record, in open court, its intention to retry Michael Tiche.[48] The Government filed its Notice of Readiness in the District Court on Connecticut on March 15, 1976.[49] On February 19, 1976, Appellant's attorney, Thomas D. Clifford, specially appointed under the Criminal Justice Act, moved to be relieved of the appointment. On March 4, 1976, the case was reassigned for trial by the Connecticut District Court Chief Judge to District Judge Zampano. (See Defendant's Appendix, A-10, hereinafter referred to simply by the Letter and the Page therein.) Defendant was then given until March 26, 1976 to file motions. (A-10). On March 24, 1976, appellant moved, as he refers to it as "within this leisurely time table", for a change of venue for the retrial. On March 31, 1976, the District Court in Connecticut, Newman, J., granted Mr. Clifford's request and further granted a change of venue, ordering the case transferred to the Northern District of New York. The Government had recorded its having no objection to either motion, (A-70), but flagged to the Court's attention the time limitation on a retrial. The Indictment was filed in the Northern District on April 13, 1976, pursuant to the Order of Transfer, and Mr. Quinlan was assigned to represent Michael Tiche on April 14, 1976. Without voicing any objection, Mr. Quinlan was granted until May 17, 1976 to file motions and to be prepared to argue them. Thereafter, defendant filed, among others, a Motion to Dismiss on May 12, 1976. At the argument of motions on May 17, defense counsel requested a continuance of the trial to June 7, 1976 in order to further prepare. The Court entered orders on defendant's motions on June 1, 1976.

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[48] See docket entry for 2/11/76, Joint Appendix, p. 53.

[49] The Notice of Readiness was refiled in the Northern District of New York on April 30, 1976.

The Connecticut and Northern Districts' Interim Plans Under the Speedy Trial Act provided (as of February 11, 1976) for retrial where ordered "at the earliest practicable time but not later than sixty (60) days after the finality of such Order." The plan previously in effect had allowed ninety (90) days and contained a clause allowing additional time for "good cause". Defendant argues that on April 12, 1976, sixty (60) days after the mistrial of February 11, 1976, the right to retry defendant had expired and an automatic dismissal was required. Such an argument is based on an absolute time limitation for a retrial and exalts the rights of a defendant over any and all other considerations. On this analysis, the reasons or circumstances surrounding the failure of strict compliance are disregarded.

Here there was no Government action which delayed a retrial. Indeed the Government immediately stated its readiness for retrial, and formalized its position by Notices of Readiness as noted above. The issue of the time limitation was flagged to the Connecticut District Court on March 26, 1976.

The intervening history cited above reflects delay attributed to the defendant in the form of requests for a Change of Counsel, for a Change of Venue (filed on March 24, 1976, 41 days after the mistrial), a Motion to Dismiss filed May 12, 1976, and a Request for Further Time for New Counsel to Prepare for Trial. Thus the delay in the commencement of the retrial was the result of these various requests which required the Court to act, the time afforded the defendant to file his motions, the preparation time granted to counsel, and the time for the court to effectuate the transfer requested by the defendant. On defendant's theory, all of these factors are to be disregarded.

defendant's strict construction is applied, then his ...g motions, his requesting delay and the court delays ... accommodating defendant's rights and interests can prevent a retrial while the court takes the time to act on defendant's various motions. It is, of course, defendant's right to make and have such motions decided. However, to permit the time required for those procedures to exhaust the sixty (60) days period and thus preclude a retrial is to put in the defendant's hands the fate of his retrial. Such would be an absurd result. If this were held to be the law, then the absence of a defendant, justified (as in illness) or not (as in flight), the absence of a defense witness or counsel, the illness of the judge or other practical problems, could exhaust the sixty (60) day period and preclude a trial.

It is not insignificant that a Revised Rule 50(b) Plan in the Northern District which became effective July 1, 1976 provided that the exclusions of 18 U.S.C. 3161(h) would apply to retrials, suggesting that the absence of such a provision in the Interim Plans was a drafting oversight.[50] Further, 18 U.S.C. 3161, The Speedy Trial

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[50] This view is supported by the fact that the exclusions of Rule 6 are explicitly referrable to Rule 5 alone. Rule 5 refers only to the six months requirement of readiness for trial from the point of an arrest, complaint, summons, etc., and a dismissal is provided. Rule 3 sets the initial time requirements and Rule 4 provides for release of a defendant on the expiration of the Rule 3 periods. There is no sanction expressed as to Rule 7. Absent an explicit sanction, resort to the inferred power to impose a sanction can have no deterrent effect if it is used in a context devoid of Government culpability. "Nor in view of the probably minor deterrent effect of punishing the Solicitor General's Office for its negligence and the competing *public interest in enforcement of the criminal laws* (emphasis added) should this period of delay be counted against the Government generally." *United States* v. *Roemer*, 514 F.2d 1377, 1381 (CA 2, 1975). It should be noted that in the case at bar there is no Government negligence.

Act, has a number of exclusionary periods set forth in sub-paragraph (h) thereof, including specifically sub-paragraph (h)(1)(F), "delay resulting from proceedings related to transfer from other districts . . ." Based on the foregoing, Judge Werker started the sixty (60) day clock on February 11, 1976, but suspended it from February 19, 1976 (when the first motion was filed) to April 13, 1976 when the Indictment was received in the Northern District of New York.[51] Indeed the request of counsel for additional time to prepare and the pendency of the further motions filed in the Northern District of New York suggest that the suspension period could have been extended even longer as the Court accommodated the defendant's rights to have certain matters considered and acted upon.

It is respectfully submitted that none of this Court's rulings on this subject required Judge Werker to dismiss the case. Neither *United States* v. *Didier*, C/A 2, October 13, 1976, Slip Op. September Term 1976, Page 73; *United States* v. *Drummond*, 511 F.2d 1049 (CA 2, 1975), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Roemer*, *supra*, nor *United States* v. *Yagid*, 528 F.2d 962, stands for the proposition that scheduling delays by the court, particularly in the course of which accommodation is given to the defendant's assertion of certain propositions in the form of motions, entitle a defendant in an absolute sense to a dismissal in the failure of strict compliance with the sixty (60) day rule.[52] As suggested in some of the court

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[51] If this were not the rule, the sixty (60) day period would have expired before the case was filed in the Northern District, as a result of defendant's Motion for a Change of Venue, and before a trial date could have been set.

[52] *Drummond* relies in part on the then existing "good cause" clause in the rule form then under consideration. If that holding supports a strict language application of Rule 7, then "good cause" should be read into the Rule in order to achieve the purpose of

[Footnote continued on following page]

language, the Government here has exercised due diligence to bring about a trial assignment. But in applying Rule 7 as a rule designed to achieve a trial, and not merely to achieve Government readiness for trial, it is not without significance, that the sole responsibility for "setting and calling cases for trial" lies with the court. See Interim Plan Rule 10(a). Defendant will rely on *Didier, supra,* and has cited no other authority. His reliance on that decision is ill-founded because *Didier* definitely involved Government steps taken which brought about, at least in part, the delay.

To order a dismissal here is to set a precedent without purpose. Delays by the court in setting a trial of a relatively nominal nature, and particularly under circumstances wherein accommodation of the defendant's rights occupied the court, at least in part, even where, as here, there has been no interim assertion of the defendant of his right to a speedy trial, would exalt the right of dismissal to an absolute status without recognition of the practicalities, the delays attributable to defendant's motions, and in disregard of the public interest in upholding the criminal laws. Thus in *United States* v.

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early trials having in mind that here, in fact, except for the accommodation of defendant's rights as noted above, there was an early trial, as early as was practicable. The purpose of the Rule is not to provide an escape for a defendant when the court exhausts the 60 days accommodating defendant's rights. . . . [T]he Plan was not established primarily to safeguard defendant's rights, but to serve the public interest in the prompt adjudication of cases." *United States* v. *Flores,* 501 F.2d 1356, 1360, cited in *United States* v. *Roemer, supra,* at 1351. See also *United States* v. *Drummond, supra,* at 1052, n.8. An alternative is to deem any action by defendant engaging the court's time during the otherwise running of the sixty (60) days as either a waiver for that period of time, or a suspension of the running of the time required for the court to respond to defendant's motions.

Roemer, supra, at 1381, the court noted its concern about a dismissal working a penalty against the prosecution where the circumstances of delay are no fault of the prosecution. And thus the court went on to note "the delay from March 18 to at least May 1 then, can not fairly be charged against the prosecution." So also in *United States* v. *Yagid,* where the court, although finding in prolonged delays no basis for good cause, since the court itself was responsible, a dismissal without prejudice was held proper. *United States* v. *Yagid, supra,* at 1969.

To sustain the defendant's argument would be to create the anomalous situation wherein a defendant could engage the court in matters which exhausted the time within which retrial would be permitted and thus bring about his exemption from a retrial. Such a result is neither consistent with the purpose of the Interim Plan nor the Speedy Trial Act, and in fact flies in the face of the purposes of both which insure the public interest in enforcement of the criminal laws but at the same time press for the prompt disposition of cases. Such a result would neither be reasonable nor logical and Judge Werker's denial of the Motion to Dismiss should be sustained.

B. The District Court did not err in failing to inquire as to the scope of the jury's disagreement prior to giving the "Allen" charge; nor did it later abuse its discretion by declining to make such an inquiry at the precise time when it finally was requested by appellant Tiche.

On the morning of the third day of its deliberations, the jury reported that it was unable to reach an agreement as to any of the counts against appellant Michael

Tiche. At this juncture Judge Werker advised counsel that he intended to give a modified Allen charge. Although appellant generally objected to the giving of such a charge, at no time prior to the actual giving of that charge was the trial court requested to inquire of the jury as to the scope of its disagreement or the likelihood of it being able to reach a verdict without benefit of supplementary instructions.

Appellant Tiche's request that the jury be inquired of by the District Court was not made until shortly before 5:00 P.M. on Thursday afternoon, June 17, 1976, a full day after it had been given the modified Allen charge and only a few hours after the jury had requested that certain testimony be read back to it. Although appellant's request was initially denied, at approximately noontime on the following day Judge Werker ultimately did inquire of the jury as to whether it felt an agreement might be reached. The jury responded affirmatively. Approximately an hour and a half later, a verdict of guilty was returned.

The precise issue before this court is whether the trial court erred in failing to make an unrequested inquiry prior to its giving of the Allen charge, and whether it later abused its discretion by declining to make an inquiry at the exact moment when it finally was requested. The government respectfully submits that the trial court most clearly did not abuse its discretion, that no error, reversible or otherwise, was committed, and that appellant's claims to the contrary are manifestly lacking in merit.

Neither of the two cases relied upon by appellant supports his claim that the trial court erred in giving a modified Allen charge without first specifically inquiring into the scope of the jury's apparent disagreement and the likelihood of it being able to arrive at a verdict.

In *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), the issue was simply whether the trial court had abused its discretion in declaring a mistrial. The *Beckerman* Court affirmed the trial court's ruling, noting that one of the factors which the trial judge had considered was the possible danger of coercing an erroneous verdict by requiring further deliberations. The fact that the Court in *Beckerman* affirmed the trial court's exercise of discretion in that case is hardly authority for the proposition that Judge Werker abused his discretion in this case.

Similarly inapposite is *United States* v. *Goldstein*, 479 F.2d 1061 (2d Cir. 1973). The issue in *Goldstein* was whether the trial court had abused its discretion in declaring a mistrial *without* first inquiring of the jury as to the scope of its disagreement and the likelihood of a verdict. Despite the fact that no such inquiry was made, the *Goldstein* Court concluded that there had been no abuse of discretion. *Goldstein*, therefore, diminishes rather than enhances the significance of such an inquiry and, if anything, supports the government's contention that it is not required prior to the giving of an Allen charge. This is especially so in view of the fact that the trial court in *Goldstein* had given an Allen charge *before* declaring a mistrial.

There is no requirement in law or logic that an inquiry into the scope of disagreement must necessarily precede the giving of an Allen charge. And in the present case there are sound reasons to support Judge Werker's failure to so inquire.

Examination of the text of the note by which the jury communicated its disagreement indicates that further inquiry by the court was unnecessary. That note on its face disclosed the scope and extent of the jury's dis-

agreement. The note stated, "We, the members of the jury, cannot reach an agreement *on any of the counts.*" (Emphasis added). Since there were no other defendants on trial, and since there was apparent disagreement on all counts against appellant Tiche, a partial verdict was impossible. Therefore, no purpose would have been served by the trial court venturing into an area where inquiry may be "pregnant with danger to the free deliberation so essential to the proper functioning of the jury." *United States* v. *Medansky*, 486 F.2d 807, 813 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Cf. *United States* v. *Smoot*, 463 F.2d 1221, 1223, nn. 2, 3 (D.C. Cir. 1972).

In addition to being unnecessary, the government respectfully submits that such an inquiry would have been inappropriate prior to the giving of the modified Allen charge. Analysis of those few cases which discuss the practice of inquiring into the scope of disagreement and the likelihood of the jury being able to reach a verdict indicates that the purpose of such an inquiry is simply to guard against the improvident granting of mistrials. The inquiry, in short, is designed to establish a factual record upon which an appellate court may later rely in determining whether a criminal trial was justifiably *terminated*, thereby possibly subjecting a defendant to retrial. See *United States ex rel. Russo* v. *Superior Court of New Jersey*, 483 F.2d 7, 15-16 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States* v. *See*, 505 F.2d 845, 849-853 (9th Cir. 1974), *cert. denied sub nom. Gordon* v. *United States*, 420 U.S. 992 (1975), and cases cited therein. Also see *United States* v. *Medansky*, *supra*. The rationale supporting the practice of making such an inquiry simply does not apply in the context of a decision to *prolong* a trial.

Finally, the government submits that the trial court's failure to make such an inquiry prior to giving the

modified Allen charge is further justified by appellant's failure specifically to request an inquiry until well after the charge was given. Although appellant objected to the giving of an Allen-type charge on Wednesday morning, June 16, 1976, he did so exclusively on the grounds that he was satisfied with the apparent deadlock existing at that time. Appellant did not request that the jury be inquired of until late in the following afternoon, which was well after Judge Werker's supplementary charge. For this reason alone appellant should be foreclosed from complaining of the trial court's failure to make an inquiry at this juncture. Cf. *United States* v. *Pelose*, — F.2d — (2d Cir. 1976), Docket No. 76-1025, *slip op.* at 4896-4897 (July 12, 1976); Rules 47, 51, 52, Fed. R. Crim. P.

When appellant finally did request that an inquiry be made, the jury was already in the process of considering testimony which it had asked to be read back. This request for additional testimony, which was made well after the Allen charge and shortly before the appellant's motion for an inquiry into the jury's progress, unquestionably indicates that the jury was indeed taking positive steps to resolve independently its earlier disagreement. To have granted appellant's motion at the precise moment it was made would have, therefore, been tantamount to asking the obvious. The government respectfully submits that the trial court clearly did not abuse its discretion by temporarily declining to ask whether the jury had made progress when it was manifest that progress had indeed been made.

When the trial court finally did inquire as to whether progress was being made, the jury responded affirmatively, thereby indicating that a verdict was likely. Shortly thereafter a verdict was in fact reached. In view of the

foregoing, the government submits that absolutely no prejudice resulted from Judge Werker's deferred inquiry. Any suggestion to the contrary should be rejected. *Cf.* Rule 52(a), F. R. Crim. P.

Similarly, the government maintains that the giving of the modified Allen charge itself was also appropriate. Judge Werker's supplementary instructions were not given until an apparent deadlock was reported on the third day of deliberations. Hence it cannot be maintained that the charge was given precipitously or prematurely. See generally *United States* v. *Zane*, 495 F.2d 685, 689, 692 (2d Cir. 1974) (Allen charge on third day of deliberation); *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971) (*Per Curiam*) (Allen charge after four and one-half hours deliberation); *United States* v. *Hynes*, 424 F.2d 754, 756-757 (2d Cir. 1970) (Allen charge on first day of deliberation). Cf. *United States* v. *Simpson*, 445 F.2d 735, 736, n.4 (D.C. Cir. 1970) (affirming, but prospectively advising against, the giving of a modified Allen charge in *initial* instructions).

Nor can it fairly be claimed that the giving of a modified Allen charge in the present case coerced the verdict which was ultimately reached. This conclusion is compelled by the fact that, subsequent to receiving the supplementary charge, the jury requested, received, and considered certain trial testimony which was read back to it, and did not return a verdict until the following day. Thus, rather than being viewed as the product of coercion, the verdict should be regarded as the result of free and careful consideration of the evidence.

CONCLUSION

For all of the foregoing reasons—the actions of the trial courts should be sustained and the appeals should be denied.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1140

U S A,

Appellee

vs.

DAVID BUBAR, et al

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Patricia O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 12th day of November, 1976, deponent served the within Appeal Brief upon See attached list

Attorney(s) for the See list in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me, Patricia O'Hara

This 12th day of November 1976

Edward A Quimby

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